Presented to the
Litchfield Historical Society
by Mrs Child ~~Clarence Deming~~.
October 8th, 1902.

PRESENTED TO

THE LITCHFIELD HISTORICAL SOCIETY

BY

MRS. NATHANIEL ROCHESTER CHILD.

The decease of Mr. Daniel Sheldon Junior announced in your paper of the 5th. instant is an event which may well excite many and deep regrets, in the minds of all who knew him, either personally, or by reputation. In the death of this gentleman, his friends and the public have sustained no common loss. The instance is rare, indeed, in which any individual leaves the world, with higher claims to an affectionate and honourable remembrance, among those who survive him.

It is not my intention however, to attempt a regular biography, or even a formal delineation of the character of this excellent and much lamented man: but justice to his memory, and to the public, as well as the respect due to the afflicted survivors of his family, seems to require at least, some slight and general public memorial of his worth.

Mr. Sheldon was one of those, to whose memory it is impossible to do even imperfect justice, without employing what is apt to be regarded, by the world at large, as the language of undeserved eulogy. But I have entire confidence that those who intimately knew him, nothing, expressed in this brief notice, will appear to partake of that character.

In describing personal qualities superlatives are in most cases, incorrect: but there can be no danger of exaggeration, in affirming, that Mr. Sheldon's mind was in one of Nature's finest and most perfect moulds. The intellectual and moral elements of his character were so happily blended and proportioned, that it might justly be said of him, (if it were not too much to be said

of any man) that nothing was left to be desired, in the constitution of his mind. The remarkable and uniform mildness and refinement of his manners-the perfect amiableness of his disposition-the purity and blamelessness of his life-his extraordinary intellectual endowments-and his very extensive attainments, in the various departments of all liberal and useful knowledge, distinguished him in the sphere in which he moved, and would have distinguished him in any sphere, as one of the most accomplished, and most estimable men of the age. No subject worthy of investigation, in science or letters, escaped his attention;nor was there any branch of learning, either useful or ornamental, which he had not successfully cultivated and familiarized,not only was "he a scholar, and a ripe and good one" but in the language of Mr. Burke respecting his lamented and only son, he was a "finished man."

Mr. Sheldon had scarcely passed the years of infancy, when he entered upon a course of liberal studies, which he prosecuted with extraordinary success, and in which he displayed an early maturity of mind, almost unexampled.

And these studies a mind like his, could never, amidst all its subsequent pursuits, consent to abandon. At the age of sixteen he was examined provisionally, as a candidate for admission to the bar of this state; and though legally inadmissable, as being under "full age,"he received from the court, a certificate, declaring his proficiency in legal science, to be sufficient for the practice of the Law, and entitling him to admission without further examination, when he should attain the age of twenty one years, but before that period arrived, he was appointed to a clerk-ship, under the Secretary of the Treasury of the U.S-s; and thence to the day of his death, was employed successively, in the Treasury department, and in the capacity of Secretary of Legation, and Charge d'affaires, to the French court. In every public situation which he held he was eminently qualified for his official duties. With the constitution, the laws, and the useful institutions, not only of his own country, but of the several nations of Europe, and with the

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political relations, and great interests of each, and all of them, no man, in the U.S. was probably, better acquainted than Mr. Sheldon, but though possessed of the most unquestionable qualifications for high preferment:he never sought it, and never wished it. He aspired to excellence but not outward distinction. His intellectual treasures were collected for use-not for exhibition. On every subject to which he diligently applied his mind, his knowledge was not merely correct: it was at once comprehensive and minute to an extraordinary degree. But from a lofty and delicate sense of propriety, which marked his whole deportment, he ever shrunk from a vain, or useless display of his acquirements. He was indeed, not less distinguished, by the native delicacy of his mind, than by his intellectual endowments. Very few men, even among those who are distinguished by their talents and acquirements, have been gifted with minds of a higher order than his: and no one, probably, ever "bore his faculties " more meekly.

It must be very consoling to Mr. Sheldon's mourning friends to know, that he has been "honoured and mourned" in a land of Strangers: that his useful, honourable, and blameless life, was closed by a tranquil and peaceful death, and that he has probably not left a personal enemy behind him.- Seldom indeed, has a purer spirit left the earth: and seldom have the purest left it, so entirely without reproach.

Extract from letter giving an account of Mr. Sheldon's death.

"He appeared all along, aware of the little probability there was of his recovery:and frequently expressed to me, with perfect composure, his expectation of the fatal termination of his complaint. He retained his reason, until the last, and never did a man bear up under the pressure of disease and extreme debility, with greater fortitude, resignation, and patience than he displayed." "His funeral took place yesterday, (April I6th.) and was attended by all the Americans here (Marseilles)- by the English Consul, and a number of French and English gentlemen. The American Captains in port showed their respect for his memory, by hoisting their flags half mast.

by Judge Gould.

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by Judge Tomlin. -

Notes
taken from Judge Reeve's
Lectures upon Law.

Litchfield (Con.) Jan.y 24th 1798.

Dan.l Sheldon

Introduction —

Of Municipal Law.

1 Bl. Com. 44. Municipal Law is very properly defined to be "a rule of civil conduct, prescribed by the supreme power in a State, commanding what is right & prohibiting what is wrong" — Sanctio justa, jubens honesta, prohibens contraria. —

Municipal law is not capable of more than two accurate divisions; — Statute, and Common Law — altho' it is commonly divided by the writers on this subject, into many others, as law merchant maritime law &c. —

Laws enacted by the legislature are said to be Stat. laws — or the lex scripta. — Common law is that which has arisen by the decisions of Courts, and as it has not its foundation in any edicts or decrees of the legislature or sovereign but upon the general usage common to the whole community it is called the lex non scripta. —

General customs are the universal rule of the whole country, & form the common law in its proper & more usual signification & while particular customs are the exceptions

Vide, as to customs & the requisites of a good custom &c. 1 Bl. Com.

are to particular places; as for instance the custom of Kent in Eng. called Gavelkind, is the com. law of that particular place. Both depend upon exercise —

Vide end of Loft. Rep.

There are certain maxims universally acknowledged & received as principles of the com. law; & so far it may be said we have something to resort to — When these fail, the case is novel, & the Ct. has nothing to resort to but the dictates of reason & justice which are written in no volume but that of nature, & which are indelibly imprinted on the mind & heart of man — Their decision is then made according to what is reasonable & right, & becomes a precedent for future cases to resort to — It is not true, therefore, that Cts. never make law.

It is true they do not make the law of reason but they make decisions agreeable to that law, & these decisions establish a rule as part of the Common Law which was no part of it before. If this were not the case, there would, in many instances be a failure of justice — For every case that comes before the Ct must be decided upon; & if the Ct could decide only upon those cases which have before been decided upon, in all novel cases there could be no decision. —

Another rule which we find in the books & which is a law is a consequence of the one that Cts can not make law, is, that as the com. Law depends upon immemorial usage it must have all arisen & been established before the time of legal memory. The era of legal memory, is the accession of Richard 1st to the throne of Eng^d. According to the rule, all the Com. Law must have originated before that time — To show that this rule is a perfect nullity it is only necessary to observe, that many entire branches of the com. law, as, the law-merchant, the law of Paraphernalia, & Executory devises, were totally unknown at that era & have arisen to form a part of the present body of the com. law, without the interposition of any statute. The law of Paraphernalia was formed into a system under the chancellorship of Lord Hardwicke — The law respecting executory devises took rise in Elizabeth's time, & great part of the law merchant, was not framed till the law had arrived into a Science. Consequently it is a much more liberal system than the body of the com. law which was framed in very dark ages — So that it is clearly not necessary to the validity of the com. law, that it should have existed immemorially, or in the solemnity of our legal phrase, "time whereof the memory of man runneth not to the contrary" —

3 Burrt. 93.

Precedents are not law themselves, but only furnish prima facie evidence of what the law is: otherwise it would

1 Bl. Com. 69. 71.

be impossible that there should be any alteration in them — If precedents were to govern absolutely, & be invariably followed in all cases, it would preclude all possibility of improvement — The law would be the same 200 years hence, as it is now, & instead of altering with the manners & customs of the people, & in some measure conforming itself to them as it should do, it would remain a stale & antiquated rule, without spirit or meaning, in many instances, erroneous & unjust, & in almost all, unfit & inapplicable —

Comp. 39. In considering therefore, whether a precedent is binding we ought to look at the principle on which it is founded — & if it is not conformable to that, we are safe in determining that it is not law — Agreeable to this, we often find Cts. declaring that such & such precedents are not law, altho' recognized by repeated decisions for a whole century — Altho' we ought to pay a decent respect to the opinions of men of learning, our judgments ~~ought~~ should by no means be concluded by them — and when we are clearly convinced that a precedent is founded on mistaken grounds, or is opposed to the principle that governs in the case, we ought not to hesitate to determine it to be erroneous, tho' sanctioned by the name of a Hale or a Mansfield —

When decisions or precedents are contradictory, we should endeavor to reconcile them with each other & with the principle, if possible, but if we cannot, we must conclude that the Judges in part of the cases have mistaken the law, & form our opinion, upon the principle & those precedents that are conformable to it —

Here positive rules of law, as that a quotor shall answer for the escape of a debtor &c. are not to be departed from, because not agreeable to reason — In such cases, the Cts must decide according to the principles established whether reasonable or not; for these principles are more positive: And altho', as between the immediate parties, they are

not necessarily founded on principles of natural justice, yet they may be broken & necessary, as founded on principles of general utility —

Vid: Introduc.

The civil law, so far as it is operative in Eng. derives all the efficacy which it has in that kingdom, from its incorporation with the written or unwritten law of the realm. — The maxims of the civil law, when adopted by the King's Courts in such a series of adjudications, as is sufficient to form, what is called the authority of precedent, virtually become a part of the common law itself, and are as binding as any precedent can be. — In the same manner when the rules of the civil law are adopted & sanctioned by Parliament, they are transformed into parts of the statute law of Eng. but they are not binding as the civil law, but as the stat. or com. law of Eng. —

The com. stat. law of Eng. before they acquire any authority in the United States, require a similar sanction. They may be adopted or rejected, by our Pol. or legislatures, as they appear conformable or repugnant to the rules of moral right, or as they are applicable or inapplicable to the particular circumstances of the country. And they become a part of our stat. or com. law, as they are sanctioned by legislative, or judicial authority. —

It has been a generally received opinion, that Eng. Statutes made previous to the emigration of our ancestors from Eng. are binding in the U.S. as much as the com. law, which is considered as obligatory in all cases, in which it is not in itself unreasonable, or unless a difference of local circumstances renders it inapplicable. — All Eng. Stat. made since the middle of the reign of Jas. 8th

are considered as having no authority in C.— The no rule
was reason can be assigned for adopting this period in pre-
ference to any other —

The reason why ancient & not modern Stat.s are
binding in the U. S. seems to be this. That the first set-
tlers of this country, on their emigration from Eng., are
considered as having brought with them, so much of the Eng.
law then in being, which is the birthright of every sub-
ject, as was applicable to their own situation & the
condition of an infant colony — such for instance as the
general rules of inheritance, & of protection from personal injuries —

Cow. Dev. 52.
1 Bl. Com. 108.
Ind. 411. 000.

Where an Eng. Stat. has been adopted by our legisla-
ture; which Stat. at the time of its adoption had received
a certain construction in the Eng. Courts, this construction
is emphatically binding in this country. & forms the
most important branch of the Eng. law, with which we
are connected. — The same ideas affixed by the com. law
to legal terms are affixed to them in this country, and
our Cts are no more at liberty to reject them & substitute
others in their stead, than the Cts in Eng. ——

Statutes are either public, or private. — The dis-
tinction between them, it is not altogether so important
to observe in C. as in Eng. Since, both public & private
Sts may in pleading be given in evidence under the
general issue & need not be specially pleaded — There is,
however, this difference between them in C: One may de-
fend under a public Stat. without reading it on the gen
issue, — a private Stat. must be read in such case, as a
part of the evidence — And in all cases, (as well here,
as in Eng.) in which an action is brot on a private Stat.
it is indispensably necessary, to declare on the Stat. — 21.

Ib. 248.

will not answer for the Plff. in this case, to rely on giving the Stat. in evidence —

4 Rep. 76. 2 Saund. 154. 1 Lev. 86. 2 Ray. 120. 3 Bl. 81. 1 Bl. Com. 85. 86.

The distinction between public & private Stat. is not very clearly defined. A Stat. respecting all taylors, or all carpenters, &c. is a private Stat. — A Stat. respecting all tradesmen, is public — One respecting all officers qualified to serve process is public: one respecting all constables is private —

" however, in any of these cases, the St. should inflict a fine or penalty to the King, in Eng. or to the State here, in which case the public would be concerned, the St. would be public —

" A public Stat. if intended to defeat a Specialty, must in Eng. be pleaded specially — In C. it is not necessary that it should tho' the uniform practice is to plead it —

Ved. 4. 2 Show. 30. 1 Bl. Com. 89.

It is said, that a Stat. which speaks affirmatively does not abrogate the com. law; unless the Stat. gives a lower remedy. This cannot be true in all cases; for, a Stat. which speaks in the affirmative, may & frequently does, necessarily imply a repeal of the com. law. As if sufficient notice of a suit were at com. law, two days & a Stat. should enact that six days notice should be given — But in such cases the Eng. Cts. have decided, that the com. law is not repealed — The only true & rational rule is, that the intention of the legislature should govern the construction —

4 T. Reb. 3.

It is also said, that of two affirmative Stat. the former is not repealed by the latter. This Mrk. supposes to be the case in those instances only, in which there was an antecedent com. law remedy: but that if there was no com. law remedy, the former is repealed by the latter, tho' both are affirmative — (Qu. as to this distinction).

1 Show. 120. Cro Eliz. 104.

Statutes. —

Of the method of declaring upon Stat.

2 Show. 384. + Vide inf. + When there is an existing remedy at com. Law, & by Stat. at the same time, it is necessary for a Pt. who brings his action on the Stat. to declare upon it, tho' it be public: otherwise it would not be known from the declaration, which remedy he intends to pursue —

4 Rep. 7 B. 2. Mod 5. — Declarations on private Stat. must recite the Stat. substantially, as in actions on Specialties; but it is not necessary to recite verbatim. —

To declar. on such Stat. nul tiel record may be ment. —

Co. Eliz. 601. 1 Bl. Com. 86. It is a general rule, That in actions on public Stat. the Pt. need not count upon the Stat.; i.e. need not allege that the wrong stated in his Decl. is contra formam Statuti. + To this rule the exceptions are numerous —

+ Vide Supra

4 Bac. Ab. 18. When a general Stat. prohibits an act, or creates a duty & gives no remedy, or gives merely single damages;

Or, where a general Stat. extends a remedy to a new case, in which there was no remedy before (as the Stat. Edw. 4th de asportatis arboribus, extends the action of Trespass agt. the Ex. for an injury committed by the Testator) counting on the Stat. is not necessary. —

Where a general Stat. gives a penalty to the person injured, or to an informer, counting on the Stat. is necessary; as it is in all cases in which penalties are to be recovered —

In all cases in which more than single damages are to be recovered on a gen. Stat. counting on the Stat. is necessary —

If a contract, conveyance, &c. which at com. law was good, without writing, is by a Stat. required to be written, it is not necessary for the person declaring on the contract &c. to aver that it is in writing; it is sufficien

that the fact appear in evidence — But if, by com. law it were necessary that it should be in writing, or if a Stat. make writing necessary to the validity of a cont. unknown to the com. law (as in case of a Devise) the Declar.: must aver that it is written — This rule has been recognized by the Courts in Con. —

1 Bl. Com. 87, 92. 3 Rep. 7

Of the construction & operation of Statutes —

7 Vid. 2.6. Plowd. 206.

A Stat. by giving a new remedy, does not annihilate that which before existed at com. law — unless the remedy thus given be more limited, than that which the com. law afforded. But when a Stat. thus prescribes a smaller remedy, than might have been before obtained, it is construed as tacitly abrogating the greater —

When the Stat. & com. law offer different remedies, either may be pursued, except in the instance before mentioned, by the party prosecuting — And if the Pltf. when thus entitled to one of two existing remedies, should pursue by legal steps, that which the Stat. offers, & fail, for want of sufficient evidence, or the like, he may still, in the same suit, resort to the com. law remedy, & recover altho' he has in his Dec.n declared upon the Stat. — Ex. gr. By Stat. in C. if the Selectmen of a Town, after having had written notice of a bridge being defective, should neglect to repair it, & any person should receive damage by such defect, he shall recover double damages — Now, in an action brot. upon this Stat. if the Pltf. should be unable to prove the written notice by which he would be entitled to double damages, yet if he could prove notice by parole, tho' that would not entitle him to a recovery on the Stat. yet that being suff.t evidence at com. law to subject

2 Bl. Rep. 900. Moor. 750. Hawk. P.C. 211. Vic. 212. 301. 385

Statutes -

the Town, he could in the same fact recover by com. law single damages —

Yet if the Stat. give a remedy in any case, in which none existed at com. law; or, the Stat. giving a remedy, requires a mode of prosecuting unknown to the com. law; the Stat. must be alone & strictly pursued. —

Hawd. 2 P.C. Cro. Eliz. 655 - 10 Mod. 337.

But if a Stat. imposes a new duty, & gives no remedy, the com. law will lend its assistance & afford a remedy — for, in this case the offender may be punished for a misdemeanor, as having violated the wholesome regulations of society — But when a Stat. enters illegal any act or omission, which at com. law was not so, does give a remedy, no other than that afforded by the Stat. can be obtained — Qu. If the remedy is given by a separate, substantive clause? 10 Mod. 205. 5 - 3 Burr. 1799 —

10 Co. 115. 8 Reb. 118 - Hob. 87. 84. 1 Bl. Com. 91. —

Yet can that any Stat. contrary to reason or to the laws of God, be void — This brings it to a question is hard to determine — If this is the case, who is to determine this & to be void? — The Cts are bound by the acts of the legislature, & are to give them the force of saying that a Stat. is contrary to reason or the law of God, & thus are to act above the legislature —

2 Rol. Ab. 46 r. Hob. 111. 309. Cro. Car. 424.

In E. C., if no period be fixed for the commencement of a Stat's operation, it is of course, considered as binding from the first day of the Session in which it was enacted — This rule must necessarily operate, in most cases, as an ex post facto law; and, as such must occasion great injustice, especially as it affects offences against positive law —

Ved. 8.

The time at which a Stat. commences its operation in C., appears not to be fixed by any uniform determinate rule — Justice, however, would require, that all, who may be affected by the operation of a law, should enjoy the means of knowing its existence, before they are subjected to its penalties — This principle has been adopted by the Sts. in C. —

Statutes giving greater remedies than the rules of natural justice would require, or those inflicting punishments, are denominated penal — The general rule with regard to the construction of penal & remedial Stats is this, That the former be strictly, & the latter liberally construed — By strict, & liberal, is meant, that in the one case, the literal meaning of the law, & in the other, the intentions of the Legislature, collected from necessary & reasonable implications, shall be obeyed — From this rule however, Cts have widely deviated —

1 Bl. Com. 88-9. 91. —

Rowd. 80. Cro. Car. 71. 1 Mod. 282. —

An action, brot by an individual in his own right, on a penal Stat. is a civil & not a criminal action —

4 Burr. 2456-8 — Cowp. 352 — 4 Ved. 233 —

Statutes —

Some penal Stat.s are also remedial; with regard to these the prevailing practice has been to follow rigidly the rule of strict construction when the prosecution is bro.t by the public; but otherwise, when the individual injured is the prosecutor, in his own behalf — This rule obtains in cases of Fraud & others, but has not been uniform in instances —

If a man be the repetition of a crime, be subjected by law to an additional penalty, in which case it becomes necessary to prove a former offence, similar to that of which he is indicted; this requisite proof can be afforded only by a former legal conviction: no other testimony than that of a record, is admissible — In this case, the highest possible evidence is literally necessary in most or all other cases the highest testimony of which the nature of the case, all circumstances considered, will admit, is all that is requisite —

The universality of expression with respect to persons, in a Stat. is not construed to comprehend those, who by reason of legal incapacity, are already exempted from laws similar in nature or operation, to those laws or Stat.s in which such universality of terms, may be employed — Thus, in penal Stat.s, the words "all persons" do not embrace lunatics &c. — & a Stat. enabling "all persons" to dispose of property by a particular mode of conveyance, is not to extend to those persons, who were before unable to convey the same property, by methods then lawful —

Pow. on Dev. 141.

(for more on construction of Stat.s see 1. S. —) —

Statutes –

Of persons capable of prosecuting on penal Statutes.

++Vid. 428. 405. 385.

If an offence directly & equally affects all the individuals of a community by infringing the peace, no person in his private capacity can prosecute the offender for the public injury – but it must be taken up by the public officers. –

Tho' if by such public offence, any individual suffers a special injury, he may sue for his own private redress –

If an offence affects an individual only, he alone shall pursue the remedy –

When an individual sues for redress of a private injury, suffered from a public offence, he may offer the penal Stat. in evidence on his own prosecution –

If a penal Stat. affords not only a remedy to the party injured but also a penalty to the public; the public penalty is inflicted of course, upon conviction by the individual. –

In qui-tam actions, i.e. prosecutions commenced by an individual, in the joint behalf of the public & himself in cases like the last) if the individual prosecuting withdraws his suit in Court, the public officer must assume the prosecution, & recover for the public — If the qui tam action be privately withdrawn the public officer on discovery, may institute a new action agt. the offender –

++Vid. 405.

Conviction on a qui tam action, is a good bar to a public prosecution for the same offence –

2 Sw. 403 –

If the prosecutor in a qui tam action recover Judgt. he may remit his own share of the penalty, but tho' of the public he cannot –

Statutes. –

Fraud practised by the prosecutor, on a qui-tam act, does not defeat the public remedy; or, if he delay the prosecution, to secure impunity to the offender, still the Stat. of Limitations does not run agt. the public. –

If, on a popular action (i.e. one which may be brot. by any individual, for the violation of a penal Stat.) it differs from an ordinary qui tam, in this; that the latter is brot by the person injured, the former, by any individual whatever), any number of confederates be convicted, a single penalty only is recoverable – On penal Stats. not thus open to private prosecution if an action be brot & judg.t be obtained against a number of confederates, by the public, each one must pay the whole penalty inflicted by the Stat. – The reason assigned for the distinction in these two cases, is, that actions of the former class are founded on contracts, those of the latter on torts – For, crimes are several; but contracts joint –

(N.B. With all deference to the fathers of the sons of the com. law, this distinction thus applied, appears to me frivolous. + –

The distinction between penalty & forfeiture is, that the former, is given to one, or to any person; the latter to the Public —

Statutes -

(Of the operation & construct^n of Stat^s. cont^d from p. 6.) -

It is a general rule, That Stat^s. cannot have a retrospective operation - From this rule, however there are exceptions, in the construction of Eng. Stats: - Ex. gr. If, after the commission of an offence, which is malum in se, (i.e. naturally & intrinsically wrong, such as murder, theft, perjury &c.) the law by which it was punishable be repealed, & a new one substituted, making it punishable in a different manner; the offender may be punished under the latter. If the act be not in itself criminal; it cannot be thus punished by a subsequent law, as usury &c. -

1 Bl. Com. 54. +

2 Mod. 310. -

If a man covenant to do a thing, lawful at the time, & a subsequent Stat. render the act unlawful; it is holden that the Stat. annuls the covenant. - This, however, is a litigated point - So if one covenants not to do a lawful act, & a subsequent Stat. makes it his duty, the cov^t. is said to be repealed or annulled.

1 Fonbl. 211.
2. Sw. 130. -
Eq. 270. - 1 Sal. 198. L. Ray. 1352. Pow. on cont. 445. -
4 Vin. 183. - 124.

But if the thing covenanted not to be done, be unlawful at the time of the engagement, a subseq^t. Stat. rendering it lawful does not repeal the cov^t. In this case, the subsequent Stat. merely permits the act, but does not make it a duty -

vide author. cited above -

If a Stat. repealing a former Stat., is itself repealed; that which first existed is ipso facto revived -

1 Bl. Com. 90.

If a Stat. invests a body of men with power to transact certain business, by majority (Act of Parl^t. respecting the British museum) & constitutes a certain number of that body a quorum; a majority of the quorum, tho' superior, is not able to act for the whole. - This point is not settled in C. ——

8.b.

Statutes.

In some cases, in which Stat. have declared certain acts void Cts. have adjudged them voidable only. There appears to be some contradiction upon this subject. It is said, that when a Stat. declares an act "void to all intents & purposes" it must be adjudged void; but that when the act is declared "void" only it may be adjudged voidable. Mr. R. thinks the true rule to be this: That if the object of the Stat. would be defeated by the acts being considered voidable only, it must be construed void, but that otherwise it may be adjudged voidable. And that the words "to all intents & purposes" have no certain operation.

When a Stat. declares void a contract or transaction which was before only voidable, as to various circumstances like those contemplated by the Stat., the term void is considered as intended for voidable. But if the cont. or transaction, thus declared void by Stat. be not thus circumstanced, it is construed as absolutely void ab initio.

The construction of Stat. belongs to the Court: to judge of facts is the province of the Jury. In the case of special verdicts, if it be possible that the facts found, may consist with the innocence of the Deft, the Ct cannot infer his guilt. If the facts found are inconsistent with his innocence, the Ct may make the inference. The law is, that the same degree of testimony which is sufficient to authorize a Jury to find a Deft guilty, when the construction of the Stat. is by them understood, is also sufficient to enable the Ct, in case of special verdict to do the same by comparing the facts found with the construction of the Law.

Of Husband & Wife.

1. Fonbl.

IV. Of the right the Husband acquires by the marriage to the Wife's property.

The general principle, by which the law of this branch of the subject is regulated, is founded on the duty of the Hus^d to maintain & protect the Wife, & because it is his duty to maintain & protect her, the law has given him the disposal of her property to afford him in the fulfilment of this duty.

Co. Lit. 351. 1. Of the wifes personal property in possession. The ownership of this description of property is by marriage absolutely vested in the husband to all intents & purposes whatever, & upon his death goes to his Ex^r or adm^r.

1. Fonbl. 304 &c. 4 Vin. 307. - 1 Rol. 342. Moor. 352. 3. Mod. 180. 2. St. 180. 1. Show. 24. 3. Atk. 528. 1. Wils. 161. - 1. P. Wms. 381. 2. Of the wifes personal property in action, or as it is generally called her choses in action, such as bonds, notes & other evidences of debt &c. - This, the hus^d may during coverture, dispose of at pleasure. While the wife is living he exercises his right of ownership, & thus reduces it to possession. She is totally & forever divested of any right over it. But if the hus^d neglects, during the life of the wife to make any disposition of it, he loses at her death all title to it, & it passes to her representatives. From these principles it is obvious that the husband cannot dispose of his wifes personal property in action by will; for the act evidencing the husband's intention of disposal, must be an act taking effect in his life time; in such case, therefore, upon his death, they would remain to the Wife.

1. Atwd. 179. 3. Ab. 189. If during the Coverture, the Husb^d has commenced an action upon a chose in action belonging to the wife, for the purpose of reducing it to possession, & dies pending the suit, it survives to the wife. So, if she dies in such case, it survives to him. This is upon the principle of the jus accrescendi, which takes place in the Eng. Law, in all cases of a joint judgment. Now, as in the State of Connect. we acknowledge no such principle as the jus accrescendi, this ought not to take place; but if the Wife should die in such case, it ought to descend to her representatives, for it is not as yet, reduced to actual possession by the husb^d. If the husb^d dies first it would, on the same reason, survive to her.

1. Fonbl. 308. 3. T. Rep. 94. Husb^d cannot assign his wife's choses in action without a valuable consideration. Yet he may give a voluntary release of her hands.

By the Stat. Car. 2^d the husb^d is made Admin. upon his wife's estate, in the event of her death, & as he is not obliged to account to any person for her property which comes into his hands, he thus becomes virtually entitled to her choses in action. He is even, under the construction of this Stat. to be considered as being next of kin, that if another is appointed Admr. still the husb^d is entitled to the surplus of her choses in action after the pay^mt of her debts. But this Stat. has no operation in C.

3. Atk. 520. 1. Wms. 108. A settlement made upon the wife before marriage, by the husb^d has been considered as a purchase of her choses in action by him, & they become his, whether reduced to possession during coverture or not.

2. Bl. Com. 439. 2 Vern. 502. Talb. Ca. 108. Ca. in Ch. 189. 1. Fonbl. 91. 310. Pre. Ch. 63. 312. Sed vid. Amb. 692. 2 Vern. 68.

Co. Lit. 351. 46. 3. Of her chattels real. To these the husb.d
1. Fonb. 304 &c. a more extensive right than to her choses in ac-
1. Rol. 344-5. 4. Dum. 638. q.t. tion. He has not only the entire disposal of them during
coverture, but they survive to him upon her death.
So upon his death they remain to her. But he can-
not dispose of them by will, as that operates not
until after his death. Yet he may by an act executed
1. Rol. 344. during his life, & his wife being alive also, grant her
Cro. Eliz. 287. chattels real to vest in possession even after his death
Bohk. 5. or in the case a right of future enjoyment lapses
instanter. So they are liable, during his life, for
his debts. In C. the jus accrescendi in joint tenancy
+2 Ro. whether in Eng. law they survive when q.t. heritable of joint tenancy being rejected, it is presumed that the chattels real of the
wife, would not, on her death, vest in the husb.d but go to
her legal representat.s.

4. Of the wife's real estate. Of this the husb.d
acquires only a right to the usufruct. The right
of alienation, or of the property itself, he does not ac-
quire it not being considered as necessary to enable
him to maintain & support her. This right to the
usufruct lasts only during the coverture, unless the
husb.d has had by her a child born alive, & capable by law
of inheriting the estate in which case, he is entitled to an
4 Co. 27 b. b. estate during his life, by the custom of Eng.d which is called
By a Stat. of Hen. 8th husb.d & wife may lease his lands
for 3 lives or 21 years. No such stat. in C. but as husb.d
& wife may in C. alienate her land in fee, it would seem
that a lease by them, jointly, for any term of time,
would also bind her, here, after his death. If
the husb.d alone, grants a fee or any estate larger
than one for his own life, in his wife's lands, the
grant will operate only as a lease for his life.

Husband & Wife.

At com. Law, arrears of Rent, due to the wife
5. Lit. 351. while Sole are subject to the general laws, regulating
her choses in action, but by a Stat. of Hen. 8th they vest in
the husband on the death of the wife, & on his death
go to his Ex.rs &c. Is this Stat. binding in C.? — If husb.d
5. Burnt. 654. & wife are joint tent.s of real pro. the husb.d alone cannot dispose
of even his own part —
1. Atk. 695. At Com. Law a feme covert can have no separate
1. Ch. 298. 2. Ib. property. — But in case of a gift to a feme covert to
663. 2. Vern. her sole & separate use the Ch.r of Chancery will pro-
748. 3. P. Wms. tect her in the enjoyment of it independent of her husb.d
334. 354. & she may exercise as absolute a power over it as if
3. Atk. 99. 393. she were a feme sole — And property may be thus giv-
1. Ib. 278 — en to her, either before or after marriage —
4. Ves. 15. a.

It was formerly indispensably necessary in order
1. Raw on. 443-4. to settle a separate estate upon the wife, that trus-
5. Burnt. 434. tees should be appointed to stand seized to her use. —
3. Ib. 618. But in later decisions the idea has been adopted,
2. Ves. 66-7. that prop.y may be immediately vested in the wife
1. Bonbl. 94. 98. by the husb.d or any other person, without the in-
4. Ves. 15. a. tervention of trustees — 2n. by the husb.d after mar-
riage? & is there any difference in this case be-
tween real & personal property? —

Husband & Wife.

II. Of the Advantages in point of property which the wife acquires by marriage.

During the coverture, it is evident there can be of no consequence except merely the participation of the husband's property; but after his death, she is entitled, if he dies intestate, & leaving issue, to one third of his personal property remaining after the payment of debts; if he has left no issue, she is entitled to half. She is entitled,

+ Ibid. 277 a. moreover, by the Eng. com. law to a life estate in one third of all the real property of which he was not seized during the coverture, (except that which he

Co. Lit. 30. 31. held in jointtenancy), provided she could legally have issue, capable of inheriting it. According to this law it is necessary that the wife should join

1 Fonbl. 270 the husb. in the conveyance of real estate capable of being inherited by her issue, in order to secure the purchaser against her claim of dower. If the husb. dies before the age of consent, the wife is to be endowed. In Eng. if the husb. was seized in law having never entered, the wife is entitled to dower; not if having entered, he is disseized before coverture. In the words of the Stat. of G. are that she shall be

Ibid. 277 a. endowed of all the lands of which he died seized; it has been customary to give her dower in lands which he was at the time of his death, disseized

Property in order to vest in a feme covert, must be given to her for separate use; and a gift of this nature the husb.d cannot by disagreement defeat. But, if it clearly appears that property given to the wife, was intended to be exclusively hers, no particular form of words is necessary to vest it in her as such. — Tho' this is the general rule, yet, in some cases, the wife is allowed to acquire an exclusive right to things given her, even tho' no words are used evincive of the grantors intention to vest the property solely in her. — This variation from the general rule just laid down is founded on the nature of the property, or the circumstances under which it is given. — Thus, diamonds given by the husb.ds father, to his daughter in law, on her marriage, are adjudged to belong solely to her. — A present made by a stranger, to a feme covert, is in some instances considered as her exclusive property. — And trinkets given by the husb.d himself in his life time to the wife, become on his death in some cases the exclusive property of the ~~wife~~ latter; & not liable for the husb.ds debts. — But this is not the case with property given by the husb.d to her, for the express purpose of being worn to ornament her person, or as it is usually denominated her paraphernalia.

4 Ld. Ra. 13.

3. Atk. 393.

1. P. Wms 730.

3. Atk. 393.

2. Bl. Com. 434.

There are of two kinds — the 1.st comprises her necessary apparel & bedding; the 2.d her ornaments, as jewels, trinkets &c.

Rol. Ab. 911.

Moor. 210.

15. b.

Husband & Wife.

2. Atk. 217. 3. Ib. 358, 395. Cro. Car. 340 con. 1. Col. 911. 2. Vern. 246. 1. P. Wms. 729. 2 Bl. Com. 440. Hay. max. c. 49.

During the life of the husband the paraphernalia are his property. The second kind are absolutely at his disposal, tho' the 1st are not. But, according to modern authorities, by which the law on this point is now settled, he cannot devise them by will; tho' during his life, perhaps he has the power, if wickedly disposed to exert it, to sell them, or give them away, i.e. the 2d kind.

The 1st kind of paraphernalia can in no instance be taken by the husbands creditors, for the payment of his debts, nor can he sell them.

2. Atk. 104. 3. Ib. 359. Cro. Car. 344.

Paraph.a of the 2d species are assets in the hands of the husb.d &c. when all the other personal prop.y is exhausted, but not before. & they may not take legacies be taken by him, as long as any other personal prop.y remains —

By the Eng. law, real estate is not subject to the payment of debts by simple contract, tho' it is liable for those by specialty. But if a man die, leaving personal property sufficient for the payment of all his simple cont. debts, & the specialty creditors resort to the personal fund, & exhaust it, or so far diminish it, that it is not sufficient to pay the simp. cont. debts, Equity will allow the creditors by simple cont. to come upon so much of the real estate as would have been liable to the creditors by specialty, if they had taken it.

2. Atk. 77. 104. 3. Ib. 340.

3. Atk. 359. Cro. Car. 340.

In this case, the wifes paraph.a of the 2d kind may also be taken for the payment of debts, but she may be immediately reimbursed out of the real estate; that being liable to her for the amou

of her paraph.a thus taken, just as it would have been to the Jimp. cont. creditors if they had chosen to take it instead of her paraph.a — And

2 Vern. 246. Ch. J. in this case will compel the heir to make her compensation.* —

* has the same right ag.t a Devisee? —

3. Atk. 393. Legatees or next of kin can never claim her paraph.a of either kind; unless there has been a Settlement made upon her in bar of all de-

2. Vern. 49. 83. mands. — This will deprive her of her paraph.a

Qu. as to the 1st species? —

3. Atk. 369. 130. If the hust. upon his death charges his real

2. Ab. 77. — property with the payment of debts, still his personal is liable — And if in such case his creditors take his wifes paraph.a as they may, those of the 2d kind) she will, in Equity, be considered as a creditor, & let in upon the real estate to the amount of her paraph.a thus taken. — But this right of hers to be a creditor

2. Vern. 246. when paraph.a are taken, it seems is not transmissible to her Ex.r. —

In the State of N.Y. real as well as personal estate is liable for the paym.t of all debts, & the Ex.r has the ch. legal of it, for that purpose — So that if he should be permitted to take the paraph.a in preference to lands for the paym.t of debts, he would be immediately obliged to reimburse the widow out of the lands; hence it would seem to be improper to let him take the paraph.a until both the real & personal funds were exhausted —

for it would be idle, & produce very unnecessary trouble to suffer the Ex.r to deprive the widow of her paraph.a & then to allow her to call immediately on him for reimbursement out of a fund, with which he might have discharged the debts, for the paym.t of which the paraph.a were taken. Even in C. however, the paraph.a are liable in the last resort. —

3. Atk. 393. If the hus.d in his life time has redeemed the paraph.a of his wife, she after his death, & not the Ex.r is entitled to redeem — and for this purpose she is to have aid of the personal fund of the hus.d if there be any left after the payment of debts, & this to the prejudice of legatees. — So, if the personal fund has been exhausted by specialty creds. she will have aid of the real estate. —

Of the hus.d's liability for the tort & debts of the Wife, contracted before marriage.

It is a general rule, that the hus.d becomes liable by the marriage for his wife's debts, & for the torts she may have committed before marriage. For such demands hus.d & wife must be sued jointly. But this liability lasts, only during the existence of the coverture. After her death, he is no longer liable, unless the demand has attached upon him during coverture, by the institution of a suit; & it is a question, whether he is liable, even if a suit is commenced unless judgm.t is actually recovered during coverture. But this point is not settled; there is no case of his liability unless judg.t was recovered.

1. Bl. Com. 409.
1. Rol. Ab. 351.
Cro. Car. 370.
3. Mod. 186.
Carth. 303.
1. Ponbl. 91.
+ Ibid. 18a.

In such case, if the hus.d dies, no demand having been made upon him, during the coverture, for the debt, it revives ag.t the Wife, & she becomes liable for it. The hus.d's E.t is entirely discharged from all liability.

The principle on which the hus.d is liable for the debts & torts of the wife, is Mr. R. Roberts, That as the wife by marriage, loses the command of her property, & has no means of paying her debts, or of securing herself by pecuniary aid, from arrest & confinement, she ought not to be taken without the hus.d, by whose legal rights resulting from the marriage, she is thus deprived of the means of personal protection, ag.t those who might have claims upon her.

1. Ponbl. 84.
Cro. Jac. 445.
Salk. 115.
6. Mod. 1.
Cro. Eliz. 3.
Cro. Car. 58.
3. Wils. 124.

18.a. +Ld. 29.b.
2 Ld. Ray. 73.
Str. 1167. 1257. 1272.
2. Bl. Rep. 720.
Ib. 327-8.
1. T. Rep. 480.

Husband and Wife.

In no * case, therefore, can the wife be taken without the husband either for debt or tort, tho he may be taken without her; And if both are taken together, & the husb.d escape, the wife must be liberated.

+Ld. 17.

If husb.d & wife are sued jointly for her debt, & she dies before judg.t it is doubtful whether recovery can be afterwards had ag.t the husb.d — Mr. L. Ch. Ju. says, that on the general principle which separates the husb.ds liability on the wife's account, a recovery could not in this case be had ag.t him; the wife being no longer in those circumstances under which the leading principle before mentioned, is calculated to relieve her. —

1. Id. 337.
3. Mod. 180.
Carth. 30.

If judgm.t is recovered ag.t husb.d & wife, & the wife die before payment, the husb.d is liable in the judgm.t because a right of collection has attached ag.t him by the judg.t —

The husb.d is liable not only for the torts of the wife committed before marriage, but also for those committed afterwards, during the coverture — And the law is the same if she commits alone, & without the aid, direction, or abrobation of the husb.d i.e. they must both be sued for it. But if she commit a

tort in company with her husb^d he alone is liable upon the presumption that he forced her to do it & that in doing it she acted under his coercion — So, if she commit a tort in the absence of the husb^d but by his direction, he alone is liable. But if it can be expressly proved, that he was ignorant of the act, or disapproved of it tho' committed while in company with him, they must both be sued. And in all cases where husb^d & wife are jointly liable for her torts, the liability survives against her, after the husb^ds death.

1. Hawk. P.C. 3. 1. Lev. 203.

The husb^d is liable, with the wife, for such of her crimes as occasion only a penalty; for penalties are recoverable by debt or stat, which is a civil process.

1. Hawk. P.C. 4. 2. Hra. 1120. 2. Sw. 370.

He is in no case liable for the wife criminaliter, except in case of treffpass or bare theft, committed by her in his presence, & with his knowledge, & then indeed the act is considered as his, & he alone is liable, she being entirely excused.

3. Bur. 1679. — 1682.

For crimes of a higher nature committed by both, both are liable, tho' the husb^d used coercion. And, if committed by her alone, she alone is liable.

19.a.

Husband and Wife.

Of the Wife's power to bind herself by her own Contracts.

1 Bin. No. 40. p. 33. It is a general rule of Common Law, that a feme covert can in no instance make herself liable by her own contracts, tho' she may in many cases bind her husb^d. The true reasons of this rule are not, as the books frequently tell us because by the marriage her legal existence is merged in that of the husb^d or that being a feme covert her physical power of making a cont. is suspended, &c. but they are the following. 1st That she has no property; the law having given it all to her husb^d or deprived her of the use of it. — 2^d That she is presumed to be under the coercion of the husb^d & liable to be influenced entirely by him in the making of her contracts. — 3^d That if she were allowed to bind herself by her contracts, & render herself like other persons subject to arrest and imprisonm^t upon the wanton attiment of them the marital rights of the husb^d would be affected particularly that one which entitles him to the enjoyment of her company at all times; a right viewed by the law as superior to any other merely civil right, & not to be transgressed except when public justice requires it, as a punishment for some crime. — When, therefore, we find a feme covert placed in such a situation that none of these reasons operate to prevent her making conts. she is bound by them as much as any other member of Society. — Such a situation is she in, when her husb^d is banished the realm, when he is an alien enemy, or when he is transported for some crime;

Salk. 116.
1 Ld Ray. 147. —
Sparrow vs. Carruthers
Carth.

for, in neither of those cases do any of the above reasons forbid her to contract.—

2 Ves. 190. 2. Atk. 379. 1. Br. Cha. 16. 1 H. Black. 334. 2 P. Wms. 144. 1 Forbl. 98. 102

Courts of Ch.y have also of late, since the practice has become established of allowing her to hold seperate property, suffered her to contract respecting that property, even while living with her husd. & held her to be bound by such contr.— but, no further than to the extent of that property: so that, still, her body cannot be taken in exon.; as that would infringe the husd's rights.—

2u. 2 T. Rep. 430.

Courts of Law, however, will not, even under these circumstances sustain an action agt. her; tho' there appears to be no suff.t reason why they should not.

1. Forbl. 98-102. 1. Durn. 5. Pow. on C. 814. 5. Durn. 682. 6. H. 505. 4. H. 750. Eb. 120. 5. Bro. Cha. 377. 1. H. Bl. 344.

So, when the wife lives apart from the husd. with a seperate maintenance, she is liable before a Ct. of Law to the whole extent of her cont. for her. She has property of her own, she is not under the coercion of her husd. & no right of his can be affected even if she is cast into prison, for he has abjured them all by the articles of seperation.—

Husband and Wife.

*Vid. 24. a. If the wife, living with her husb. levies a fine of her estate, she is bound by it, but the husb. may avoid it during her life. This is the only mode by which she can effect a conveyance of her real estate for she cannot make a grant of it by the ordinary methods, as that would deprive the husb. of his right to the usufruct, & she cannot make a grant of it to take effect after his death, for that would contravene the maxim that "no freehold estate can commence in futuro." But in C. as a freehold estate may be granted to commence in futuro, there seems to be no reason why a feme covert cannot convey away her real property without the intervention or consent of the husb. In this case, however, the conveyance must be so framed, as not to interfere with the husb.'s legal right to her estate. This doctrine has not as yet been established by any adjudications.

*Vid. 24. a. The wife may purchase real property & a deed of conveyance to her, is good, i.e. if the husband consents; for it seems his consent is necessary, where there has been an actual purchase. Why it should be necessary, it is difficult to conceive. For this rule there appears to be no reason; it rests solely on the sovereign will & pleasure of the husb.

Co. Lit. 3. 350. Doug. 435. Barnfather v. Moffat. 3. Co. Rep. 26.

Such a purchase, however, it is said, the wife may dispose of, after the coverture is determined.

1. Rol. 349. Co. Lit. 3.

The husb. cannot by his deed, deal a gift to the separate use of his wife; nor a devise or descent of lands to her.

Of the wife's power to bind the Husband. —

The general principle on which the power of the wife to bind the husbd by contract is founded, is as laid down in the Eng. law, his consent to such contract, either express or implied. — This principle tho' rational & sound as far as it extends, is however too narrow to warrant all the consequences, which have been drawn from it. For in many cases, when the husbd expressly dissents from the conts. of the wife & his dissent can be proved, he is still liable. — He is bound for instance, at all events to provide his wife with necessaries, & if he fail or refuse to do it, she may procure them, & make him liable for the payment. — This principle, therefore, is insufficient. The true principle, which governs under this head, appears to be, the husbds obligation arising from the marriage contract to provide the wife with such necessaries & conveniences as are suited to her rank & condition in life. For this is the import of the word "necessaries." —

1. Bl. Com. 409.
Co. Lit. 112.
Salk. 120.

In the following cases where the husbd is bound by the wifes contracts it is on the ground of assent clearly. — 1st. Where his assent is expressly given, either before or after the cont. 2d. Where the husbd has usually permitted the wife to make contracts of the same kind, & he has fulfilled them. 3d. Where the wife procures articles which come to his use or the use of the family, & this without any prohibition by him. — In these cases assent is clearly presumable — in the following it is not. —

1. Ld. Ray. 120. 125.
1. Rol. Ab. 351.
1. Salk. 118.
2. Vent. 155.
2. Str. 1214.

21. a.

Husband and Wife. –

Ib. 124.
1. Forb. 104. 1 Sid.
12 G. 4. Bur. 2078.

If the husb.d turns away his wife, he is at all events liable for her necessaries: or if she leaves his house for sufficient cause, without being turned away, – And, in either of these cases, he is bound by her conts. for necessaries tho' made with individuals, whom he personally prohibited to trust her.

2. Str. 1214.
1 Salk. 118.

If a wife leave her husb.d to live with an adulterer, the husb.d clearly is not bound by her conts. even for necessaries. Or, if in any other case, a wife desert her husb.d without sufficient cause, he is not Mr. Justice Foster's liable on principle to provide her with necessaries; because having deserted the duties, she has also relinquished the rights of a wife. However, this has not been settled by adjudic.n. – If, in these cases, the person trusting her, has had no means of knowing the fact of the elopement, it may be a question whether he ought to suffer the loss or the husb.d. – The authorities are contradictory. –

1. Sid. 129.
Stra. 706. 875.

1. Lev. 5.
Str. 547. 706.
1. Forb. 104.
1. Bl. Com. 404.

If the elopement be not adulterous, but without just cause, & the wife afterwards offer to return; if the husb.d refuse to receive her, he shall from that time be liable for her necessaries.

Str. 875.

1 Lev. 5. — If a husb^d provides necessaries for his wife at home, he may prohibit any person, or the public at large to deal with her, & such prohibition, shall, if the notice be sufficient, release him from her contracts. For, in this case, he discharges the duties the law requires of him as a husb^d. —

3 P. Wms. 483. Pre. in Ch. 502. 1 Ford. 84. The husb^d is not liable for the payment of money lent to the wife, unless it appears that the money so lent, was expended for necessaries; & then he is liable only in equity. —

1 Salk. 118. Show. 283. If a feme covert purchases cloaths, & pawns them, without having worn them, the husb^d is not liable. So, if she pawns her cloaths before or after wearing, & borrows money to redeem them. —

2 Vern. 17. 1 Ab. 408. Voluntary conveyances by the wife before marriage are sometimes fraudulent as ag^t the husb^d — not so, when made to provide for her children by a former marriage; nor, where being made on consideration, the purchaser was ignorant of the fraud. —

1 Salk. 116. If articles of seperation are agreed upon between husb^d & wife & the husb^d allow the wife a seperate maintenance suitable to his & her rank & degree in life, he shall be exempted from all liability to her contracts. — If her seperate maintenance be merely colorable, he shall still be liable. —

+ Qu. conts. made before marriage.

Husband and Wife.

Of Conts. between husband and wife.

Cro. Car. 551. Cro. Jac. 571. cont. The general rule under this head is, That all conts. between husb. & wife are void; & that those made between them, before coverture are destroyed by the intermarriage. — The reason of this rule, as we are told by the old writers on Com. law is, that the legal existence of the wife is merged in that of the husb. & that, therefore, any cont. between them is impossible. A much more rational reason is this, That during coverture, husb. & wife cannot maintain suits ag.st each other upon such conts.; for the wife can in no instance sue alone; she must join her husb. with her in the suit; if, therefore, she wished to sue her husb. upon a cont. she must make him a pltf. with her, & he would also be deft. which would inv. a manifest absurdity. — But there are many exceptions to the above rule. —

1 Pow. on Cont. 438. 444.

If the husb. covenant with the wife not to interfere with her as to her estate, & not to meddle with it, he is estopped from so doing. —

At Com. law, no cont. between husb. & wife respecting personal proptg. could be valid, as the Com. law does not recognize her power to hold such proptg. but, in Chancery, when she has property either real or personal settled to her sole & separate use, her conts. with her husb. respecting it, will be enforced.

1 Pow. on C. 444. 2 Ves. 669. 1 Cont. 94, 98. 102. 300. 303. 2 Vern. 64.

At Com. Law too, a conveyance of land directly from the husb^d to the wife would be void. But a conveyance made by the husb^d to a third person for the use of the wife, is valid. And as the Stat. of uses (27 Hen. 8. c. 10.) executes the fee in the person having the use, the husb^d may now virtually, even at Com. Law, make a direct conveyance to his wife by deed: the deed of convey^ce vesting the uses, & the Stat. immediately vesting the fee. — In Chancery, the rigor of the above rule also, is much relaxed. —

Co. Lit. 112. 187.
2 Bl. Com. 335.
3 Atk. 93.
3 P. Wms. 33 n. q.
1 Vern. 532.

If the husb^d to encourage the wife's industry, engage to give her a part of her earnings, this agreement is binding upon him, & the part thus given to the wife, becomes her sole & separate property. —

3 P. Wms. 337.

Articles of agreement between husb^d & wife, on separation will be enforced both at law & in Equity, & the husb^d, in this case, will be bound to the extent of his cont. whatever it may be. — But he is bound no further than the articles import: if therefore, in the articles, he has not relinquished his right over her person, he may still claim it; so, any future property derived to the wife by descent, legacy &c. will belong to him, if he has not, in the articles, expressly renounced his right to it. —

3. Br. Ch. 614.
1. Bur. 452.
Id. 541.
2. Vern. 386.
1. Toubl. 105.

Husband & Wife.

Of conts. entered into between husb. and wife before marriage.

+Vid. 182. a. Tho' it is a general rule that the marriage discharges an obligⁿ. due from the husb. to the wife before marriage, yet, if the obligⁿ. should be left uncancelled by the husb. & the wife should survive, it is somewhat doubtful whether the cont. would be considered as annulled by the marriage, or as reviving in favor of the wife agⁿ. the representatives of the husb. The

Cro. Jac. 571. cont. prevailing opinion is, that the obligⁿ. would be wholly extinguished; agreable to the maxim, that a personal cont. once suspended, is forever extinct. It is, at least, true, that the husb. during coverture may cancel or destroy it, if he pleases. —

But another question has arisen, if a man

Pow. on C. 421-3. Hut. 17 or 47. Hob. 215. Cro. Jac. 571. Com. Rep. 67. 1. Salk. 325 6. Carth. 312. 511. 2. Vent. 343.

gives a bond to his intended wife, conditioned for the payment of a certain sum, after his death. Shall the wife recover upon it agⁿ. his Ex., in the event of surviving him? — What the intent of the parties was, is evident, viz. that she should, but technical niceties have occasioned some doubts in Cts. of Law. — In Chancery such a bond has been

+Vid. 182. a. 1. Fonbl. 93. 2. Vern. 481. 2. Vent. 343. Pre. in Ch. 237.

considered as affording sufficient evidence of an agreement; & without enquiring into its validity as a bond, the Ct. will decree a specific performance: And, it has, at length, come to be admitted, in a Ct. of Law, that such a bond is binding & recoverable after the husbⁿ. death. —

5. Durn. 381.

A covenant by the husb.d to leave the wife a certain sum at his death, is good & has always been considered so even at law; this not being encumbered with the technical objections attending a bond, it not being a debitum in præsenti, as the penal part of the bond is. —

1. Rol. 343. 2. Ib. 407. Palm. 99.

* Vid. 20. a.

If a feme covert aliene her real property by fine* or common recovery, the conveyance is good ag.t her & her heirs, tho' the husb.d, by dissenting, may defeat it. — (N.B. It is doubted by some, whether the wife's land can be conveyed by common recovery. 1. Bac. Ab. 302 — 1. Fonbl. 300.). — If the husb.d join in levying the fine or suffering the recovery, the conveyance is valid to all intents & purposes. These are the only kinds of conveyance, from which the wife cannot dissent after coverture. — If a wife grant a lease, or dispose of her property, by any other than the judicial conveyances just mentioned, she may, after the coverture annul or affirm the convey.ce: And if in this case, she does not either expressly or by implication confirm the convey.ce, her heir after her death, may defeat it. —

1. Rol. 340. 1. Ves. 229. Co. Lit. 43. 10. Co. Rep. 43.

* A fine is a conveyance made in a Ct. of Justice, under the inspection of the Ct. 2 Bl. Com. 352 &c.

The same rules hold, as to purchases made by her during coverture — After the coverture is at an end, she may affirm or dissent to them. —

* Vid. 20. a.

Husband and Wife. —

If husb^d & wife are made tenants in comm
1. Rol. Ab. 349. the latter may disagree to the purchase, after
the determin^n of the coverture. —

2. Lev. 39. If land is granted to a man & his wife, &
Co. Lit. 187. a third person, the husb^d & wife take but one half.

Of the power of the husband over the wife's person.

By the old Com. Law, the husb^d might give
1. Bl. Com. 471. his wife moderate correction. But this principle
is now antiquated. As the law now stands, if the
husb^d has beaten the wife, she may by com^n law
have him bound to keep the peace; or if he only
menaced her, he may be bound to his good behav-
iour. But she can never prosecute him for dam-
ages, for if recovered, they would immediately
be his. To prevent the wife from destroying
1. Str. 478. 875. his property, & from keeping lewd company, the
1. Bl. Com. 471. husb^d may abridge her of her liberty. (It would be
well if some wives had the same power over their
husb^ds). —

Husband & Wife.—

+Vid. 240. a. b.

1. Bl. Com. 469.
2. Hawk. P.C. 31.
Brownl. 47.
2. Durn. 263.
Co. Lit. 6. b.
Bul. N. P. 286.

+ It is a general rule, that husb.d & wife can in no instance, testify, or be witnesses in a c.t of law, for or ag.t each other.— One reason for this rule is, That, the husb.d & wife, in contemplation of law are but one person; & nemo sese accusare tenetur. And another maxim prohibits any person to be a witness in his own cause; nemo in propria causâ, testis esse debet.— But a reason much better founded & much less technical is this, That they shall not testify for or ag.t each other, lest it should create domestic disturbance, and, in

Hardwick. 264.
2. Ray. 1. Str. 1094.

? { pursuance of this latter reason we find, that the wife of one party to a suit, cannot testify, even if her husb.d & the opposite party, both consent.—

So rigidly has the above rule been adhered

2. Durn. 253.
2. Ld Ray. 752.

to, that the wife cannot in any case give evid.ce tending indirectly to criminate the husb.d & vice versa; not even in a case, between third persons.—

Vid. 240.

But, there are exceptions to this rule: As,

1. When the wife exhibits a complaint ag.t the husb.d for a breach of the peace in abusing or threatning personal injury to her, she may be a witness ag.t him, & vice versâ.—

2. When the husb.d is prosecuted by the public,

Hut. 115.

for an offence in abusing the wife, it has been holden that she may testify ag.t him. The case in Hutton, however, which establishes this law, has been denied to be good law by some cases, but the

1. Str. 633.

latest case extant, acknowledges it to be good.—

When husb.d & wife are seperated by a divorce a mensa et thoro, or by articles of seperation, can they testify for or ag.t each other?—

Husband and Wife.

Of the joinder of Husband & Wife, in Suits.

1. As Plaintiffs. — There are some cases, in which the wife must be joined with the husband in an action; others, in which he may sue alone, or join her at his option. & others, in which he cannot be joined: —

Lack. 119. 3. Burr. 62. 1 Wils. 224. 1 Sid. 25. Yelv. 89. Cro. Jac. 501. 535. Cro. Car. 133. 2 Bl. Rep. 1235. 515. 217. —

1. The wife must be joined, in all cases where the right of action would survive to her on the death of the husb.d; as in actions when her notes, bonds &c. (see, 1 Ponth. 305, 6.) to for a personal injury done to the wife &c. The reason why the wife cannot sue alone in cases of this description, without the husb.d, is not from any incapacity of her, but merely to save the opposite party harmless, who, if he should recover act.t the wife only, would be unable to obtain his Costs, as she is presumed to have no property, & is not liable to arrest, or civil process. —

1. Rol. Ab. 347. Ce. Lit. 55. Cro. Eliz. 700. 537. —

Husb.d & wife must join in an action to eject the deft. from the wife's land, the recovery must be to the wife whole use. — And tho' a right of action which would survive to the wife accrue during coverture, she must be joined; as in case of slander, assault & battery, trespass for cutting her trees &c. —

1. Vent. 295. this case not reconcileable — 3. Lev. 403. —

But in an action of trespass, for destroying emblements on the wife's land, she must not be joined because these would not, on the husb.ds death, survive to her, but go to his Ex.r.

Cro. Jac. 501. — Cro. Car. 90. —

The wife has been joined in trover for her personal property, taken before, & converted after marriage. But if the trover was after marriage, the husb.d should sue alone, for he is now the absolute owner of it.

1 Vent. 251. 2. Lev. 107. 1. Sid. 172. 1. Com. Dig. 574. 3. T.R. 628-31.

4 Mod. 156. 1 Sal. 114. 1 Rol. Ab. 318. Cro. Jac. 501. 442. Palm. 207. Str. 229. Cro. 206. Cro. Eliz. 61. 3 T. Rep. 628. 631.

2. Where the wife or her estate is the meritorious cause of action, altho' the right of action would not survive to her, the husb^d may join her, if he chooses, but by so joining her, she becomes entitled to it by survivorship if the husb^d dies pending the suit. — And this is the case with all suits in which husb^d & wife (or any other persons) are joined; they are considered as joint tenants of the judgm^t & if one dies, it survives to the other, by the jus accrescendi. — But as in C. there is no jus accrescendi, altho' R. doubts whether they would survive here. —

3 Lev. 103. 2 Ld. R. 107. 2 Mod. 217. 1 Com. 390. 1 Str. 229. 1 Bac. 305.

If a bond is to husb^d & wife, or to the wife alone, dur^g. coverture, it is his, & he may sue alone, but he may join the wife. —

4 Durn^f. 616.

It has been held that a husb^d might sue alone upon a bond given to his wife as administratrix. —

Cro. Jac. 77 205. Carth. 251. Salk. 114. 4 Mod. 150. 2 Bl. Rep. 1235.

Query, Whether in an action to recover compens^n for the wife's labor &c. (which comes within the above rule) the wife can be joined unless there has been an express promise to her. —

3. The husb^d must not join the wife in actions, which tho' they may arise out of his connection with her, yet will not survive to her on his death, & in which her interest as distinct from the husb^d is not concerned,

Husband and Wife.

As in an action to recover for a trespass to emblements growing on the wife's estate. But the most material case under this head is the action brought by the husb. for the battery of the wife, per quod consortium amisit. In this action the husb. must not join the wife; as it is not brought for the pecuniary-injury of the wife; but merely for the consequential damages which the husb. has himself sustained by the battery of his wife. So if the wife has been slandered by which the husb. has lost custom at the house &c. he must sue alone for it.

Cro. Jac. 501. Cro. Car. 89. 2. Rol. Ab. 556. 1. Keb. 791. Salk. 205. 1. Lev. 140. 1. Sid. 346.

A promise made to the husb. alone, to pay a debt due to the wife as executrix entitles the husb. alone to bring the action.

Cro. Jac. 110. Salk. 117. Carth. 452.

Husb. & wife cannot sue jointly for a battery committed on them both. But if the def. is found guilty as to the husb. but guilty as to the wife, judgmt. may be given for her. because as the battery was committed on her alone husb. did right to join.

1. Bent. 328. Cro. Jac. 100. 2. Bent. 29. Cro. Jac. 555.

Husb. may sue alone for trespass & enter & his house & beating his wife. this last charge being considered merely as an additional circumstance to shew the atrocity of the trespass.

1. Str. 61.

3. Durnf. 631. + Vid. 118. b. — If an action be brot by the wife alone when the husb^d ought to be joined, advantage must be taken of the mistake by plea in abatement, or not at all. — 2. Wils. 3. 6. Durnf. 205. So, if the hus. while sole & pending the suit marries, it will abate the suit.

2. Where Husb^d & Wife must be joined as Defts. in a suit. — Co. Lit. 351. 551. 1. Wms. 149. 1. Rol. Ab. 6. 1. Leon. 312. Lyn. 328. cont. The general rule, under this head is, that when the action would survive ag^t the wife, she should be joined with the husb^d in the action: As in actions for debts due from the wife while sole: for torts committed by her before coverture, & for those committed during coverture without the direction or consent of the husb^d. — But, if the action would not survive ag^t her, she must not be joined; as, in an action for lease of lands leased to the wife before marriage, for rent accrued after coverture — As this belongs to husb^d solely, she must not be joined; but if it was for rent which accrued before the marriage, she must be joined.

Palm. 313. On a joint promise by husb^d & wife, husb^d must be sued alone.

1. Rol. 348. 744. For a battery committed by the husb^d & wife, husb^d alone must be sued — if the wife is joined it is not merely cause of abatement but error. Qu. If verdict is ag^t both may not plf. release as to wife? — And even if the verdict Yelv. 135. Cro. Jac. 203. is only ag^t the wife, the husb^d being found not guilty, 1. Vent. 93. cont^a. judgm^t may be set aside. —

Husband & Wife.

Barn. notes 90.
3. Wils. 124.
5. Durn. 194.

If hus^d. & wife are arrested on mesne process, in a case in which the hus^d. must give special bail, the wife may be discharged on common bail. Not so on final process; nor, if the wife has been guilty of fraud in pretending to be single, on mesne process.

Id. 18. a.
Eshin. 328.
Cro. Jac. 323.
2 L^d. Ray. 1525.

If an action is brot. ag^t. a feme sole, pending the suit she marries, judgm^t. may go ag^t. her in her maiden name; & she may be taken in ex^n. without her hus^d. & imprisoned. This is the only exception to the rule that the wife cannot be imprisoned on civil process without the hus^d.

1. Roc. Hist. Eng. L.
101. 111. 367. 4. H. 73.
Bract. 20. Lynoew.
1^m. 3. Cro. Car. 219. 3^m. 1. Mod. 211. 1. Rol. 86
508. 912. Plowd. 344.
1. Leon. 81. 3. Atk.
695. 709. 2. P. Wms.
82. 315. 1. Vern. 245.
2. Ve. 253. 1. Ves. 518.
190. 303. 2. Ve. 75.
1. Br. Ch. 10. Pre. Ch.
204. 1. P. Wms. 123.
740. Ved. 329.

In C. it is now settled that a feme covert may devise her real property, not only that settled to her sole & separate use, but also that in which the hus^d. has a property. But her devise must be so made as not to affect the hus^d.'s right to curtesy, & this is done by making the devise to be effect after the hus^d.'s death. This decision was had before the C. of Errors, which reversed a contrary decision of the Sup^r. C. Mr. R. G. shows the decision to be founded on the principles of the Eng. com. law, but there, she is expressly forbid to devise, by Stat.

Of the celebration of Marriage.

The Com. Law of Eng. contemplates marriage merely as a civil contract; & formerly a mere agreement by a man & woman to live together as husb. & wife & a subsequent cohabitation as such in consequence thereof was held to be a valid marriage. The ecclesiastical Courts it is true attempted to compel the public celebration of marriages & restored all rights to the husb. & wife over which they had controul if the marriage was not publicly celebrated. Of this kind was the husb. right to administr. on the estate of his wife, which as it was a right exercised under the jurisdict. of the ecclesiastical Courts they would never grant to any one not married agreably to their requisitions. But even in this case, if those courts attempted to consider such marriages as void & thus bastardize the issue the K. B. would grant an injunction & prohibit their proceedings. The Stat. of 26. Geo. 2. has made a variety of requisites to a good marriage. This see in 1. Bl. Com.

0. Mod. 155. Salk. 120. 437-8. Carth. 99. Moor. 170. 3. Lev. 370. Salk. 438. 548. 1. Bl. Com.

By the Stat. in C. no person is allowed to celebrate a marriage, till the parties are regularly published, and have consent of parents if under age. But consent is not required if the parties are of age. Our Stat. also contemplates marriage as a civil institution, for both clergymen & justices of peace are permitted to celebrate it; & both ~~can~~ do it only in their respective counties. If they do celebrate it out of their counties, they are liable to a penalty. Mr. R. Sullivan does that a marriage celebrated by any other person than a justice or clergyman, would be valid, tho' the person celebrating it would be an offender against the law.

St. of C. 280. 1. Sw. 189. cont.

Husband and Wife.

Bur. Sett. cas. 154. When the validity of a marriage comes collateral in dispute, in questions of property, or those of a civil nature, generally cohabitation, & reputation of marriage is sufficient proof of its legality, & cannot be contradicted. But in all cases of a criminal nature, & 4. Bur. Rep. 2057. those which partake of it as in actions for crim. con. & petitions for divorce, an actual marriage de jure must be proved.

Of void & voidable marriages, & Divorces.

The Com. law of Eng. contains no system or rules on this subject. The Stat. 32. Hen. 8. authorizes all marriages not prohibited by God's law & not within the levitical degrees. This defines the bounds but imperfectly. The construction given it by the eccl. 1. Bl. Com. 440. siastical Courts in Eng. is to exclude such as actually have a husb. or wife living. Such as have been in contract to others. Such as are impotent. Such as are within the levitical degrees. Note, the impediment of precontract is now abolished. Vaugh. 220. 242.

1. Rol. 340. 35. Pro. Eliz. 858. If a man or woman marries while his wife, or her husb. is living, the latter marriage is void ab initio, & no divorce is necessary.

Persons related by affinity, as well as by consanguinity, may not intermarry. And the rule for determining who may & who may not intermarry is this. No person can marry his next collateral kinswoman, or the next of kin to his next lineal or collateral relation. And vice versa. This rule is founded on the construction given by the Eng. Courts to the Levitical laws. In combating this

Vaugh. 323. 278. 248. Cro. Eliz. 228. Moor. 40. Ab. 181.

degrees the rule of the Civil law is adopted.

1. Salk. 121. But the issue of marriages contracted within these
1. Rol. 360. Carth. degrees are legitimate, unless a divorce takes place
271. 4. Mod. 182. during the lives of both the parties; & after the death of one, the legality of the marriage cannot be questioned. —

1. Bl. Com. 440. Divorces are of two kinds. one which is total, a vinculo matrimonii: the other but partial a mensa et thoro. — The causes of a divorce in Eng.
5. C. Rep. 98. a. a vinc.° matrim.° are precontract, 2nd. imbecility, & a marriage within the Levitical degrees; and as these are all causes which existed before the marriage, and which went to render the marriage unlawful the children, issue of such a marriage, are rendered bastards; and this is the invariable effect of a divorce a vinculo matrim.° except when such a divorce is granted by Parliament, as it sometimes is, for other causes than those abovementioned: in such case the child.ᵗ are declared in the Act. not to be bastards.

Co. Lit. 235. a. Cro. Car. 452. In divorce a mensa et thoro is granted only for supervenient causes in Eng. — these are three:— Adultery, extreme cruelty of one party to the other; and a well-grounded fear of death, or great personal injury on mean of the other party. This divorce does not bastardize the issue.

2. Rol. 293. Sal. 115. 1. Vern. 251. Property how affected by divorce. See author.

Husband and Wife.

Of Divorces in C. — In this State marriages contracted within the degrees prohibited by Stat. (and St. of C. 287-8. which are there particularly pointed out) are not merely voidable as in Eng. but absolutely void & no divorce necessary to make them so. Of course the issue must be illegitimate. — & man may now however, by a Stat. of C. marry his wife's sister & vice versâ.

St. of C. 145. The Supr. Ct. in C. can grant no divorces but those a vinculo matrimonii the causes for which are: — 1. Fraudulent contract, which probably comprizes all flagrant imposition. 2. Adultery. 3. Three years absence with a total neglect of marital duties. 4. Seven years absence unheard of. As this last cause goes on the ground of the death of the absent party, perhaps a shorter time attended with circumstances corroborative of the idea of his death might entitle to a divorce. — And it is to be remarked that after 7 years absence unheard of, the other party may marry without a divorce. — But if, after such marriage, the first husb. should actually return, he might annul the last marriage, but the parties would neither of them be liable for a crime.

The words fraudulent contract in the Stat. have excited some disputes relative to their meaning. — Some have supposed them to imply precontract others imbecility &c. Mr. K. supposes that the term will include any fraud or imposition made use of by one party towards the other, material to the contract. —

Stat. 277. If in case of a divorce a vinc. for adultery, the wife is not the guilty party, she may have dower of her husb. estate. — In this case, also, the Supr. Ct. may St. of C. 289. grant her immediately, a part of her husb. estate, not exceeding one third. And, if there is no real estate the Ct. may grant her one third of what they suppose

his personal estate to be. — Such a grant of the Sup. Ct. has been sanctioned by the Ct. of Errors —

The General Assembly of C. grant divorces propter saevitiam, & propter metum; & they may make them a vinc. mat. or a mens. et tho. at pleasure; & they grant such alimony as they deem reasonable. —

The age of consent to marriage in Eng. is 12 in females & 14 in males: a marriage contracted by parties under that age may be avoided by either, when either arrives at that age. The same is supposed to be the law in C. —

The marriage of an idiot has lately been holden to be void; formerly it seems to have been adjudged otherwise. A strange determination! for an idiot surely is as unable to assent to this contract as to any other. Now by Stat. 15 Geo. 2. c. 30. such marriages are made totally void. —

Cro. Car. 488. 492. A marriage obtained by duress has been adjudged in Eng. to be good, tho' perhaps a divorce might be obtained. This determin.n is certainly inconsistent with principle.

1. Roll. 22. Sal. 24. Carth. 467. 1. Sid. 180. 5. Mod. 411. 6. H. 172. Stra. 937. — Mutual promises of marriage have been repeatedly held to be consider.n for each other, & actions to be maintainable for a breach of them; tho' it was for a long time contended that there was no consider.n & that such promises might be broken with impunity. —

Of Parent and Child, including the whole subject of Infancy.

By the word child is usually meant, in law, a minor, or one under privileges. And children or infants which is a synonimous term, are entitled to certain privileges & subject to certain disabilities, wh are removed as they advance in life and arrive at cer different ages.

1. Hawk. P.C. 1. 1. Hale P.C. 25. Co. Lit. 247. b. Fost. 349. 70.

No child under 7 years of age can be punished for any crime. Between 7 & 14 he may be punished, if it appears to have been conscious of the criminality of the act committed or as it is expressed doli capax. At 14 he is equally liable with any person for his crime the law presuming him then to be able to distinguish between right & wrong good & evil.

Cro. Jac. 450. Fost. 70. 1. Hale P.C. 20.

The confession of his criminality by an infant or a plea of guilty, is to be received by judges with extreme caution, as they are supposed not to have sufficient discretion to direct them to make a proper plea, & the presumption is always in their favor if they are under 14.

1. Hawk. 147. Rowd. 364. Cro. Jac. 274. 405. Co. Lit. 240. 1. Ld. 258. 1. Lev. 169.

Infants if not named are not to be punished corporally under a general penal Stat. inflicting corporal punishm. upon an offence, unless the offence was cr punishable corporally at Com. Law or, unless by the Stat. it is made such an one as was punishable. As, if a certain offence be declared by Stat. to be felony, infts are punishable under the Stat. for felony was punishable at com. law; but if, as in case of forcible entry & detainer, an offence is punisha or if a pun. not inflicted by com. law, is afforded by Stat. to a com. & crim by Stat. not known to the com. law, infts are no included, unless specially named; but in such case the com. law punis. if there were any, may still be inflic

1. Fonbl. 81. 9. Vin. Ab. 394. An infant is said to be liable for his torts at 14; but it may reasonably be questioned whether he is not liable at any age, upon the same ground that a lunatic is, viz. that another has actually sustained an injury from his acts, & it is no matter with what intention or whether without any they were committed.

Noy. Rep. 129. For one species of tort viz. slander, an inf. is said not to be liable till 17. Sed qu. –

The age for choosing guardians in Eng. is 14 in both sexes. In C. it is 14 in males, & 12 in females by Stat.

St. off. 24.

An infant may be appointed an Executor at any age, & the appointment is good; but he cannot act as such, & his acts be binding until 17 – after which all his acts are binding, if they do not tend to make a devastavit. But an infant can never be an Administr. because he, by law in Eng. must give bonds. In C. both Exr. & Admr. must give bonds, but by an express Stat. an infant may be an Ex. at 17; his bonds therefore given at that age must be binding. –

5. Co. Re. 5. 27. Hob. 250. 1. Fonbl. 70.

St. off.

A person to make a good & suff. devise of real property must be of full age. – It is uncertain at what age in Eng. a bequest of personal prop. would be good; different authorities stating all the diff. ages of 12, 14, 17 & 18. As to testamentary matters, not regulated in the ecclesiastical courts which are governed by the civil law, it is reasonable to suppose that the rules prescribed by that law, viz. 12 in females & 14 in males would prevail. In C. the age is fixed by Stat. at 17. –

Co. Lit. 89.b. 2. Mad. 315. Pre. in Ch. 310. 1. Vern. 255. 327. 2. Ve. 164. 459. 559.

Parent and Child. —

Full age is 21 years both in males & females at which time they become fully competent to perform all legal acts, & are to be bound & treated as adults in every respect. — And this term is completed on the day before the 25th anniversary of one's birth. —

Salk. 44. 625.
2 Ray. 480. 1090.
3 Wils. 27 H.

(1.) The liability of Infants on their Contracts.

The general rule under this head is, that infants are not bound by their contracts, but the exceptions to it are numerous: &c.

1. For necessaries, infants may bind themselves and their parents. These are food lodging, washing, apparel, physic & instruction. — But it is requisite, to bind the infant, that they be necessary for him at the time of their having them. & they must be of a proper quality suitable for him in his rank & station of life. So he is not liable even when all these requisites concur, if he is under the actual government of a parent, master or guardian, & that government is duly exercised; but if he has no parent &c. or if he is absent from them and out of their reach; or if having one, that parent, guardian &c. does not take due care & provide suitable provision he may provide for himself, & will be bound, — nor in case he has a parent &c. he will be bound precisely to the same extent as the infant. +

Co. Lit. 172. 1 Rol. 724. Prem. 528. 1 Ld. 112. Latch. 157.

Cro. Eliz. 553. Cro. Jac. 500. Palm. 361.

2 Bl. Rep. 1325. Peth. 151.

Ibid. 42 b.

But, after all, it may be questioned whether the infant is ever, in truth, bound by his own contra-

+ The Stat. of C. has been held bound by some & have more after as in in com. l. respects the liability of infts. while under age but Mr. R. thinks not. — 1 Sw. 2 Kl.

Cro. Eliz. 583 Latch. 169. 3 Bac. Ab. 134. even for necessaries; for, if he purchases necessaries & agrees to give a certain price for them, he is not bound to give that price, if it be more than the articles are really worth; indeed, the law will never allow him to be liable for any thing more than the real value of the necessaries purchased let his contract have been what it might. It would seem, therefore, that he is liable, rather on a contract implied by law, than upon his own contract.

The contracts of infts. even respecting necessaries are subject to still further limitations; or, in those cases where they may bind themselves, they cannot do it in the same manner & by the same instruments that an adult may. Ex. gr. He can not bind himself for necessaries by a penal bond, or by a bill of exchange: So he is liable in no case on a negotiable note, actually negotiated; tho' he is liable, while it remains in the hands of the original obligee; or on an insimul computasset or account stated.

1 Rol. Ab. 729. Cro. Eliz. 920. Moor. 679. Carth. 160. Latch. 169.

The true reason of the non-liability of infants in the above cases Mr. R. supposes to be this: That the consider.n of the cont. when it is reduced into the form of any of the above instruments cannot be enquired into, & therefore, if an inft. were suffered to be bound by them, he might give them for other articles than necessaries; & if given for necessaries it might be at a much greater price than their real value. This rule therefore is evidently calculated to secure infants from imposition. It is to be remarked however, that the consid.n of an insim. comp. may now be enquired into, but it could not formerly, when the rule was established; and, a single bill, by which an inft. has been held to be bound, tho' its consid.n cannot now be sought into, it might formerly.

Latch. 169. 1 Durn. 40.

In C. common notes of hand by an inft. for necess. are binding, because in such cases, the Cts. go into the consid.n

Parent and Child.

When an infant does give a bond &c. for necessaries it is certain he may avoid it; but after thus avoid in it, does he not become again liable on the simple contract? This depends upon the question whether the simple cont. is merged in the bond or not. Mr. thinks that it is not, for as the bond is void, or at least voidable when it is avoided it is, as to any operation it has as if it had never been; & if it had never been, it clearly could not have merged the simple cont. —

1 H. Bl. 402.

An infant is bound for necessaries for any person whom he is by law obliged to find food as for his wife & children. So he is liable for the debts of his wife contracted by her before he married her: this is upon the principle that where an infant is permitted by law to make any principal cont. (as the marriage in this case) he is bound by all conts. ancillary or subservient to that.

Str. 168. Carter. 215. 1 Fonbl. 67. Burn. Not. 95.

For money borrowed & actually laid out in necessaries the infant is liable in Ch.; but at law he is not, unless the lender himself purchased the necessaries. — The Ch. St. in C. have decided that he is liable at law. —

Ibid. 185. b. Salk. 279. 387. 10 Mod. 67. 5. Vin. 358. 1 P. Wms. 558. 2 Ken. 344.

He is not liable for articles purchased for the purpose of carrying on his trade or profession; tho' by that trade he may derive his support & maintenance. —

Cro. Jac. 494. Str. 1083. —

Parent and Child. –

Co. Lit. 172a. 315
3. Bur. 1801–2.
1. Bl. Rep. 575.
1. Fonbl. 77.

If an infant do, without compulsion, any act which he might be compelled to do by a Ct. of Chy. or of law, or by any other jurisdiction, & the act be a reasonable & discreet one, he is bound by the transaction & cannot afterwards avoid it – As if he make equal partition, or, if being an heir, he should set off dower to the widow. – So, as he may be an Ex.r if he should receive a debt & then release it this would be good, but if he should release it without receiving it, or do any other act to his own prejudice or to the prejudice of the estate he would not be bound by it. –

2. Vern. 342. 232.
2. Vent. 351.

Infants are bound by the decrees of Chy.r but they are always allowed six months after they attain full age to shew cause against them; & they may then set them aside either for fraud or error. –

Parent & Child.

3. Bac. Ab. 132. Contracts of Infants are in some instances void, in others only voidable. It is not true however, that his contracts are any of them void to all intents & purposes, for the other contracting party may not consider them as absolutely void, & thus consider the inft. as a infs. ha. &c.

1. Rol. Ab. 730. 1. Keb. 778. The authorities on this subject are entirely irreconcileable, & many rules have been laid down in the books for distinguishing his void contracts from those which are voidable, most of which however do not answer the purpose. e.g. It has been said that his conts. respecting real prop. were void, those respecting personal property only voidable. This rule is certainly not true. Another has been that if there is semblance of benefit by the cont. to the inft. it is voidable only, otherwise wholly void. This rule is at least very uncertain, & is exploded by L^d. Mansfield as not law.

Hob. 77. Latch. 10. 1. Mod. 137. 2. Sra. 938. Moor. 105. 2. Leon. 215. Cro. Car. 502. 3. Bur. 1805. 5. b.

The following is a pretended to be a better rule than any of the above, & one coincident with most of the authorities. Where there is an executed contract & an actual tradition by the infant, of the property to which becomes thus transferred to the vendee, or if there has been that done by the infant, which in other cases makes an actual transfer of the property, there the cont. is voidable only let it refer either to real or personal property. This rule, taken in connection with the one, that the infant is always to have the full benefit of his privilege, & that if by construing the cont. voidable only, the inft. will be a loser, & not receive the complete benefit of his privilege, will convey clear ideas of the void & voidable conts. of infts. —

3. Bur. 1794 & on. 1. Bl. Reb. 575. &c. +1 id. 35. b.

3. Bur. 1802.

Thus, if an inft. should sell property to a bankrupt, & actually deliver it over to him, still he might con

under the cont. as wholly void, & retake his property from the vendee; for if he could not do this, as the vendee is totally unable to pay, his privilege of infancy in this cont. would avail him nothing, & he would wholly lose his property. — So where a young lady, an infant, agreed to sell a certain number of ounces of hair from her head, which when taken off left it entirely bare, she was allowed to consider this cont. as entirely void & maintained an action of trespass against the one who cut off her hair. — So too a penal bond by an infant, under the old rules, has been said to be void; but Ld. Mansfield thinks otherwise, for an infant cannot to such a bond, plead non est factum, which he certainly might do if it were void. —

3. Keb. 309.

3. Bur. 1805.

If an infant makes an illegal cont. which would subject him to a penalty or forfeiture, it is void, & he will not incur the penalty. —

Where an Infant sells goods & does not deliver them, as the cont. is void, he may maintain trespass for them without any demand — but if he has delivered them it is only voidable, & he must make demand of them before any action will lie; & after demand he must bring trover & not trespass. — Upon, it appears that in both cases the vendee stands in the same predicament; & can no more be said to be guilty of a trespass in either, than he is guilty of a vexatious law suit, who in any case sues an infant. —

Ibid. 30. a.

3 Vx. a 1. Show. 171. 1 Ld. Ay. 109. 445. 2 Str. 937. Cro. Car. 502. 1 Vent. 51. 1 Mod. 25. 3 Mod. 248.

Parent and Child.

When an adult contracts with an infant the former is bound tho' the latter is not. And if in this case, the inft. has received the consideration and afterwards avoids the cont. it is holden in the books that he is not bound to refund what he has received; so that he will both retain the property he has got & recover back what he paid for it. The reason given for this is, that the money can be recovered from the inft. in no action but one founded upon an implied cont. & no inft. is not liable on his conts: but it is presumed that the inft. might be obliged to refund by an action of trover or on a sum implied by law in deceit of the inft. — If the above doctrine is to obtain, it is directly in opposition to the opinion of L.d Hawks, viz. That the privilege of infants is given them as a shield & not as a sword. It shall protect them from fraud & oppression but shall not be turned by them into a means of defrauding & imposing upon others. — Mk. therefore in those cases that if an inft. will rescind a cont. he must do it upon the terms of restoring things to statu quo. —

1 Lil. 129. 1 Lev. 109. 2 Ray. 423.

Ibid. 38 c.

3 Bur. 1802. 1 H. Rep. 575. c.

Indeed in this case, Chy will sometimes interpose & oblige the inft. to do justice. —

1 Vern. 132. 2 Ib. 224.

In C. in a case where an inft. had imposed upon a man by affirming himself to be of age, & had thus procured horses, for which he gave his notes, which he had sold to a third person, & the orig.l owner having discovered the fraud, took the horses out of the hands of him to whom they had been sold, & he brot. trover agt. him, it was held by the Sup.r Ct. not to lie —

Parent & Child. —

1. Lev. 258.
1. Lev. 169.
1. Keb. 905, 913.
728.

According to the Eng. books, an inft. is not liable civiliter for frauds; tho' it is admitted that he is criminaliter. On principle, he ought to be liable in the former instance as well as the latter, not, indeed on the ground of his cont. but of the tort of which he was guilty in committing the fraud. And the doctrine of Ld Mansfield in 3. Bur. 1802. will go all the lengths of rendering him liable in every instance for fraud. —

12. C. 122. Co. Lit. 380. 3. Mod. 229. 12. Mod. 197. 243.

An infant having made a conveyance of his real estate by fine or other judicial conveyance is bound by it, unless he brings a writ of error & reverses it during his minority. The reason for this as given us is, that the infancy, in this case, can be tried only by inspection of the Ct. — & if the trial was postponed till after the infant had attained full age, the Ct. might be puzzled to tell how old he was; their sagacity not enabling them to determine that a man of full age who comes before them, was a certain number of years ago an infant! —

Co. Lit. 380.
4. Rep. 125.
3. Bur. 1794.

Feoffment by an inft. is only voidable; & he may avoid it either before or after he attains full age — The better opinion, however is, that he cannot avoid it during minority. A lease by an inf.t is only voidable. — Bargain & sale of land by an inft. may be avoided by entry — if it is void why may he not bring trespass? —

1. Rol. 728. The void conts. of an infant, it is evident, can never be confirmed & rendered valid by him; but those which are voidable, imply in their nature, that they are capable of confirm.a & validity by him — This confirmation generally to render the cont. completely binding must be made after the attainment of full age; & it may be either express, as by a new & express promise; or, it may be implied, which is generally evidenced by any act shewing his intention not to rescind the cont. as if he be lessee of land & remain in possession after full age; or, if being a lessee he accepts rent &c. —

1. Rol. Ab. 731.
3. Co. 55. 17. Cro. Jac. 320. Str. 1. Q. 1. Fonb. 131.

1. Durnf. 648. A. sues B. on a promise — B. pleads infancy. A. replies a new promise since 21. B. traverses — If A. proves a new promise, it is not incumbent on him to shew that B at the time was of full age — B. must shew that he was

In certain exempt cases in Equity, an infant is holden to be bound where he is not at law. — As,

5. Br. P. Ca. 570.
2. Eq. Ca. Abr. 161-2.
1. Br. Ch. 152.
1. Fonbl. 58.

If an infant upon his marriage make a fair & reasonable settlement upon his wife he is bound by it. — So, a feme infant is bound by an agreem.t to accept a jointure in bar of dower. — So she is bound by an agreem.t respecting personal prop.y she may have at the time of marriage.

3. Atk. 513.

2. P. Wms. 243. If a feme infant seised in fee simple of lands, should, upon her marriage covenant to convey them to her intended husband, Ch.y will enforce this cov.t.

1 Eq. Ca. Ab. 282. If an infant of a proper age to dispose by will, of his personal pro. bequeaths money or other personal property to pay his debts, Ch. considers this as a satisfac. of all his debts & the Ex. is bound to pay them all.

1 Atk. 489. A cont. made by another person in behalf of an infant may be confirmed in Ch. by the infant after he attains full age.

Ibid. 376. A general power of attorney made by an infant as has been mentioned, is void. If he should give a special power of attorney, authorising one to confess judgm. ag. him & Ex. should issue on that judgm. it will be set aside by the Ct. upon a public. proof of infancy.

Co. Lit. 52. 1 Ves. 304. 3 Atk. 710. 2 Ld. Wms. 229. Bro. 604. An infant cannot execute a general power to convey land where his discretion is in any way implicated — but a special power, where no discretion is necess. to be exercised, he may execute, unless his interest is concerned in the execution — if that be the case he cannot execute it whether general or special.

Hal. Hist. C.P. 20. It is a general rule that an infant is not liable for his laches, that is, for his negligence or for any acts of mere omission or nonfeasance. Thus if one enter on an infant's land & commit waste he may be considered his the inf. if he chooses not as a Trespasser but as a trustee for the rents & profits & a. will compel him to account. But an inf. is liable not only for voluntary but also for permissive waste, which is a mere act of nonfeasance; the St. of limitations runs ag. him unless specially excepted. There are several exceptions to the gen. rule. If an Ex. or Adm. who is a trustee for an infant does not

2 Lev. 342. 2 Ld. Ray. 175. 8 Co. 42. 3 P. Wms. 309.

sue within the Stat. of limit.ns the infant is barred.—

8. Co. 44. 1. Vent. 199. 2 Leo. 21. 2. Vern. 343. 1. Ton. Abl. 82. 3. Co. Lit. 233. b. 240. So, an inft. is bound by the condition annexed to the tenure of an estate. & if he fails to comply therewith, he forfeits the estate.— If, in this case, a penalty is also affixed to the non performance, as well as a forfeiture of the estate, the inft. does not incur the penalty. So, he

2. Vern. 560. is bound by a condition affixed to a legacy, present &c.—

The right of entry upon lands, in Eng. is not tolled or taken away from infts. as from adults, by descent. In Ca. it is taken away from neither unless 15 years is expired, & then it is taken from both.—

2. Vent. 188. Co. Lit. 1. & 2. 3. Bac. 735. b. An inft. may hold certain ministerial offices, but he cannot hold those which are judicial. The former may be granted in re-

7. Co. 48. 9. Howd. 379. version, & in that case, may descend to an inft. In this event, the inft. is bound by all the conditions &c. annexed to the office & is liable if he does not his duty.—

Co. Lit. 233. b. 3. Mod. 222. 8. Co. 44. Ath. 37. a. & an inft. gaoler is liable in debt or case for an escape (This shows that an inft. is liable in aft. arising from a tort.)

1. Rol. 2. Carth. 101. Action lies not agt. an inft. inn-keeper for loss of hogs &c. in his inn.—

Cro. Eliz. 637. Latch. 169. Co. Lit. A minor cannot be an Attorney, because he cannot make a binding engagem.t for himself or another.—

Hob. 325. An Inft. cannot be a Surgeon—

Vid. 3. Bac. 124. Moor. 637. 1. Lev. 135. Salk. 228. Fitz. 51. 1. Sid. 153. 2. Mod. 9. 1. P. Wms. 480. Fitz. 332. b. Pre. in Ch. 50. 1. P. Wms. 240. 2. Freem. 223. 2. P. Wms. 446. 2. Atk. 117. — Pre. Ch. 50. 2. Vern. 710. 274.

An Infant in ventre sa mere, is for many purposes considered as in esse. — By the Com. Law such an infant could not take real pro. by devise, unless it was by way of executory dev. By Stat. 10. & 11. Wm. 3. c. 15. the com. law is altered. — He may now take by a devise made directly to him, then let his birth, the estate descends to the heir at law of the devisor. — Such a child is considered as living at his father's death, & may take under the Stat. of Distributions. He may have an injunction to stay waste, granted in his favor & a guardian may be appointed for him.

Of Suits brought by or against an Infant. —

1. Bl. Com. 491. Cro. Jac. 640. Hut. 92. 8 Palm. 296.

When an infant brings forward a suit, it must be in his own name, but he must sue by his guardian, or prochein amy (next friend). There are but three cases in which he can sue by prochein amy. 1. When he brings a suit ag.t his guardian, as he may in certain cases. 2. If his guardian, tho' consenting to the suit, will not lend his name to carry it on; yet, if the guardian will not consent to the suit, the infant can not sue at all in this case. 3. If the infant has no guardian, or if he is so far cloigned from him, that his consent can not be obtained.

Parent & Child.

Bam. Not. 128. Gilb. L. Ev. 87. 2 P. Wms. 298. Str. 708. Cro. Eliz. 33. Sayer's Cas. 93. Dy. 104. Str. 1217. 1 Bulst. 189.

In all cases the guardian or prochein amy is liable for costs, if the suit goes agt. the infant. (Is not the infant liable in the first instance?) There seems to be some doubt in the books, whether an infant plaintiff is ever liable for costs when he loses the suit. When he is defendt. & judgmt. goes agt. him he is always liable for cost.

Cro. Jac. 620. Hut. 92. Co. Lit. 131. Hob. 268.

When an infant is sued, he must always appear by guardian, he cannot defend a suit by prochein amy. If he has no guardian before whom he is sued the Ct. will assign one hac vice; but if he has a guardian, the Ct. will not appoint one. Qu. If the guardian is out of the reach of the Court?

When he has a guardian he must be summoned, tho' if the infant is sued & the guardian has not been called in, it is not a cause of abatement, but the cause will be adjourned that he may be summoned in.

Id. 221 a.

All judgmts. against infants without guardian are erroneous in fact; that is, the error does not appear on record; and in such case a writ of error is bot coram vobis.

If an infant is sued with adults, & his guardian is not summoned, & entire damages given, the judgmt. may be reversed in toto; for, if it is erroneous in part, as it is respecting the infant, it is so as to the whole. In C. it is reversed only as to that part which is erroneous.

3 D. R. 435. Str. 189. 608. 4 Bur. 2022. Tirb. 110.

— Parent & Child. —

Of Illegitimacy. —

1. Rol. Ab. 358 9. Co. Lit. 244. A child is illegitimate or a bastard who is begotten out of lawful wedlock & not born within wedlock or a competent time afterwards. — Children if born within wedlock tho' begotten before marriage are legitimate. —

Children, tho' begotten & born within wedlock, if the father be any other person than the husband of the mother, are illegitimate. — But, by the old common law the presumption in favor of legitimacy was so strong, that such children could never be considered illegit-
1. Salk. 122. 484. imate unless impossibility of access by the husb.d to his wife could be proved & no proof whatever of this was admissible, except proof of his absence out of the kingdom, or as it was called extra quatuor maria. — Proof of absolute imbecility & impossibility of procreation
Co. Lit. 244. 1. Rol. 358. in the husb.d as if he were but eight years old, would render the child illegitimate. —

As the rule is now settled, other evidence of the
3. P. Wms. 275 6. husb.ds non-access than absence extra quatuor maria may
Co. Lit. 244 note, 245. be admitted, as that he was confined in prison at a dis-
5. Mod. 419. Str. 925. 10 Ves. 940. tance from the wife during the whole time of her gestation &c. and indeed it is to be left to the jury who may be convinced that there was no access from strong probabilities. — And of late, the rule has been
4. Burr. 356. so far extended as to admit other proof of the illegitimacy than non-access or impotency, as that the wife lived with another man &c. —

The wife is not allowed in a Ct. of Law to testify
Bull. N. P. Rex. vs Reading Hardw. 77. &c. to the non-access of her husb.d, for it is supposed this may be proved from other quarters. — But she is admit-
1. Wils. 340. ted ex necessitate (if she be willing) to testify to her own
4 Ves. 240 b. incontinence & connexion with other men. —

Parents may not by their testimony bastardize
Cowp. 591. their issue born during wedlock. — But the declara-

Cowp. 594. 2. — tions of a parent or an answer in Chy. confessing that a child was born before marriage, & thus a bastard may be proved. —

Rol. 358. — If a man marries a woman with child, tho' by another man, & the child is born during coverture, it is legitimate. —

Salk. 123. — If a woman has children which are begotten & born after a divorce a mensa et thoro, they are presumed to be bastards, but it may be proved that they are actually the childn. of the husb.d & in that case they will be legitimate. —

1. Bl. Com. 454. — After a voluntary separation they are presumed to be legitimate till the contrary is proved. —

Co. Lit. 123 n. 1. Rol. 359. Prem. S. Ro. Jac. 521. Bul. N.P. 114. — A posthumous child born after the death of the husb.d shall be deemed legitimate if born, according to some authorities within 9 months or 40 weeks after that event; according to others, if within 9 months & 10 days & by some it is holden legitimate after the lapse of a still longer time. —

Co. Lit. 8. — If the wife marries immediately on the death of her husb.d & a child is born so that it may by the course of nature belong to either husb.d it is said he may choose his parent. —

1. Ld. Ray. 95. — A bastard by the Eng. Law is considered as being filius nullius; & this idea is, in general, strictly adhered to, but a bastard is so far recognized as having parents, that a marriage between him & his mother or father would be void & incestuous. —

But in questions of property, the law considers him as having no relations. Thus, he cannot inherit property

Co. Lit. 3.b. Moor. 10. cont. by descent from his parents or other ancestors; neither, can he be inherited to, but by the immediate descendants of his body, for he can have no collateral relations. –

Fitz. 33. Rol. 443. 1 H. 35. 2 S. 4. 6. 14. 2 Ed. 4. 4. 24. He may acquire property, however by purchase; in the most extensive sense of the word but a grant, devise, or limitation of an estate to him, by the term child, issue, son &c. is not good – it must be given to him by his name of reputation. –

Co. Lit. 3.b. Noy. Rep. 35. Moor. 430. Cro. Eliz. 509. S.C. cont.ra 1 P. Wms. 529. cont. A limit.n of a remainder to the eldest son of Jane S. legitimate or illegitimate; it is said by some of the authorities shall enure to the benefit of an illegitimate son, but others contradict it – A similar limit.n to the son of John S. legitimate or illegitimate would not be good. – The reason of this distinction at law is to arise from the greater certainty of the mother, than of the father of an illegitimate child.

2. Rol. 434.

2. Bl. Com. 251. Co. Lit. 244-5. 7. Co. 44. If a bastard eigne (who is the child of parents born before their intermarriage) enter upon his father's estate as heir, & die seized, so that a descent is cast to his children, their title shall never be questioned by the mother binne, (who is the lawful heir, or child born after marriage). –

Parent & Child. – Illegitimacy.

In C. the father & mother are equally chargeable for the maintenance of an illegitimate child. – The method by which the father is ascertained & made to contribute his part of the expense is this. – The mother during her pregnancy, goes before a magistrate, & makes oath that a certain person is the father. That person is immediately arrested & brought before the magistrate & bound over to the next County Court; where, if he denies that he is the father, a trial is had either by the Court or jury at his option. – The oath of the mother, if she has remained steadfast in her declarations that he is the father, & has persisted in charging it upon him, at the time of her travail (for it is necessary that this should be done & the trial can never be had until after her delivery) will be suff.t evidence to subject him. & a possibility or even probability that he was not the father will not exonerate him. – If he is adjudged to be the father, judgment goes ag.t him for such sum as, in the opinion of the Ct. is sufficient to defray one half of the expences of the child's maintenance during four years & this sum being divided into 16 equal parts Ex.rs will issue quarterly for one of those parts during that time. But, if the child dies within that time, the remainder of the exns will be stayed. – So, if there should be any extraordinary expense incurred by great sickness &c. the Ct. upon applic.n will enhance the sum contained in the exns. – The judgm.t also requires of the father that he should find surety for the fulfilment of the judgm.t, & also find surety to the Town that they shall incur no expense in the maintenance of the child.

If the mother does not prosecute, or if she discontinues the suit when once begun, the Town (by the Selectmen) may, in either case, prosecute for their own security. – In these cases, it has been said that the Selectmen may oblige the mother to charge the child, by oath on the father. – Mr. R. thinks otherwise. ——→

+ Qu? in Middlesex county.

5. Burn. 373 What the mother, during her pregnancy, swore before the justice, is good evidence, after her death, in favor of the town or parish, & on such evidce. an order of filiation may be made agt. the putative father - vid. in C.?

This proceeding agt. the father, is in its form a criminal prosecution; but in its effects it resembles a civil suit entirely, except that if the father does not comply with the terms of the judgmt. by finding sureties &c. he is to be committed to gaol & is not allowed to take the poor prisoner's oath. - Thus, it has lately been settled that this suit is not a chargeable; tho formerly the decisions were both ways - Bonds for prosecution are not required of the mother.

Depositions are admissible, tho there has been some doubt about it, notwithstanding the criminal form of an action of bastardy. —

Of the liability of Parents & Children to support each other.

St. of C. 232-3. Parents & grand parents are obliged by Stat. to maintain their children & grandchildren when they become poor & unable to maintain themselves, & vice versâ. - This obligation is enforced by application to the County Court by way of memorial, which may be made by any kinsman of the pauper, the Select men of the town, the pauper himself or any of his neighbors. - Upon the memorial all the parties concerned are cal'd before the Ct. & the expense of maintenance is then apportioned out among them according to their ability, reference being had to no other consideration, for if one has been advanced by the father & the other not yet is

they are of equal ability they must contribute equally. If any one neglects to pay the sum assigned to him, or to find security for the performance of the judgmt. of the Ct. Rns are to issue quantum ag.t him. — If bond is given for, said is exn granted or the bond sued? —

Grandparents are not liable while there are parents, or grandchildren while there are children. — Qu. which are first liable child.n or parents? are grandchild.n liable before parents? —

1 Str. 190 Ki. v. 155. Sons in Law are not obliged to support their wives parents. — Laudem Domino!

2 P. Ray. 1454. 4 Burr. 1149. 3 Ch. Com. — con. On Eng. the Husb.d is not bound to support his wifes children that she had before marriage. — But C. the practice is otherwise & perhaps the law — (Qu. is he liable if they are not minors?) Tho upon principle he ought not to be liable unless his wife before marriage was able to support them. —

Of the liability of parents for the contracts of their children. —

Ibid. 1 Sw. 217. 1 Ibid. 258. Parents are, in general liable for the contts. of their children to the same extent to which masters are for those of their servants. — With respect to necessaries however they may be liable further; for the parent is bound in all cases, where he neglects to provide necessaries without consent either express or implied, or even in spite of a prohibition. — He is therefore liable in all cases where the infant himself is, & necessarily to the same extent. —

Ibid. 34.a.

But, he is also liable in some cases, where the cont. is not for necessaries, & where the inft. is not himself liable. — There are principally the following: —

1. If a child is expressly empowered to contract for his parent, the latter is bound by the contract. —

2. If the child has a general licence to transact business for the parent. —

3. If articles purchased by the child, come to the parent's use. —

4. If the child has a general licence to transact business for himself; or, if, as it is usually called the parent has given him his time. —

5. If the Parent has usually ratified conts. of a certain kind made by the child, he shall be bound by those of a similar nature. — There is some difficulty in determining how far occasional ratifications shall render him liable; but the general principle of discrimination appears to be, That if the debts contracted by the child are of such a nature as that payment by the father affords good presumptive evidence of his approbation, he shall be bound to fulfill those of a similar nature. But if they are of such a nature, (gaming debts, for instance) as that payment by the father affords no rational presumption of his approbation, he shall not be bound in future, in consequence of such payment or ratification. — This rule has been adopted by the Supr. Ct. in C. —

Whenever the parent is liable on his child's conts. he may be charged in the declaration, as the contracting party, & proof that his child made the cont. &c. will support it. —

Parent and Child:—

#Vid. 53. The Parents liability for the Torts of his child stands on the same ground as that of the master for those of the servant. If the child in performing his Parents business commit a tort the Parent is answerable. But if the child while employed in his Parents business commit a tort which is no way connected with the performance of the business, the child & not the Parent is liable.—

1. Bl. Com. 4 C. 1. Hawk. P.C. 131. Cro. Jac. 290. Parent & Child may justify an assault & battery in defence of each other.— But if either is the aggressor & has made an unjust assault, the other will not be justified in assisting him, unless his interference was necessary for the personal safety of the one engaged; in which case the interference of any one would be justified.—

Of the Education of Children.

The Eng. Law has made it the duty of Parents to give their children suitable education, but there are no regulations to enforce performance of this duty.—

Sl. of Ct. By Stat. in C. Parents are required to instruct their children to read in the Bible, & to learn them the law ag.t capital crimes; or if not able to do that, are to instruct them in some orthodox catechism.— By another Stat. the Selectmen of the Town are authorized to take children from such Parents as neglect their educ.n & put them under a suitable instructor.—

Parent and Child.

An infant may acquire property in any way, but by his own services; what he thus acquires belongs to his parent; for as the parent is entitled to his services, he is entitled to the avails of them: — Nor can his earnings be even given to him by his parent, any more than any other property of such gift would tend to defraud creditors. —

If an infant has been beaten or sustains any other personal wrong, he is himself entitled to the damages or smart money; but his parent is also entitled to an action per quod servitium amisit, for the loss of service & consequential damages that he has sustained. — & if the parent has sustained any expense in curing the wounds of the child &c. he may recover
9. Co. 113. — it in this action, but it must be specially stated.

It is on this ground (per quod serv. amis.) that a parent is entitled to an action for the debauchery of his
2. L. Ray. 1032. daughter. — This together with the expense incurred in
3. Wils. 18. her sickness were originally the grounds of the action,
2. Vent. 353. and still continue, at least nominally, to be so; but in Eng. damages to a vastly greater amount are always given in these suits, & this for the disgrace insult & injury to the feelings of the parent. — And Mr. Justice
2. Sw. 03-5. cont. that as these are evidently the grounds of damages, a suit ought to be sustained where no loss of service is stated; but it never has been done. —

It is not necessary to prove that the action be the
3. Bur. 1878. parent, that the daughter should be a minor; but the loss of service is still the nominal ground of recovery. She must be proved to have been the servant of her
2. Burr. 168. parent; but the least service or even nominal service is sufficient. —

This action may be sustained by any person
2. Burr. 4. standing in loco parentis if there be no parent, as by an aunt.

Parent and Child.

3. Wils. 18. In these actions the daughter herself is a good witness.

This is in form an action on the case; but if there has been an illegal entry of the plt's house, by the defendt. the plt's vi et armis lies & the debauching may be given in evidence to enhance damages. But in this case no recovery can be had till the plt's fact by illegal entry is proved.

2. Burns. 158.

3. Bl. Com. 141. Co. Litt. 7 a. Fitz. N. B. 90. 2. Sw. 62. — The parent may also have an action on the case for enticing or hiring away his child. Qu. Why is not in analogy to the action for seduction have an action for enticing her into bad company & thus ruining her morals? Ans. Because that is a Spiritual Court. The grounds of recovery are the same in one case as the other. But the action has never been determined.

Of the Parent's right of Correction.

1. Bl. Com. 448. 4 Rio. 5 Qa. According to the books the parent has a right to correct the child moderately. This is very indefinite, for what may appear moderate to one man, may not to another. The proper criterion to be regarded in these cases is the disposition with which the punishmt. was inflicted. If the parent really thought the correction proper & necessary, altho' others might not think so, he is not blamable. But if he allows to be influenced by malice in inflicting the punishmt. he is then certainly liable in an action by the child not by his next friend. So that there must be both immoderate correction considering the nature of the case & malice in order to render the Parent liable in damages. The malice is to be inferred from the nature & circumstances of the fact, the mode & instrumt. of correction

Of Guardian and Ward.

The kinds of Guardianship known to the com. law of Eng. are the following, viz.

Co. Lit. 88 b. note 11. 1. Guardian in chivalry. This guardianship depended upon the military tenure of knightservice, & as that tenure was abolished by Stat. 12. Ch. 2. this guardianship fell with it, & is now entirely abolished. –

Co. Lit. 88. b. no. 12. 2. Guardian by nature. This may be father or mother, or any more remote lineal ancestor. – At Com. law it was irrevocable only of the heir – a parent, & it is therefore did not extend to females. – It regards only the person, & not the estate of the ward, & lasts till his attainment of full age. – The parents have now come to be considered in Eng. as natural Guardians of all their children, i.e. such guardians as the law of nature points out; but the Chancellor may displace them if he sees fit. –

3. Co. Rep. 38.

Coath. 386.

In C. nat. guardship extends both to person & estate of ward. –

3. Guardianship in socage. – This obtains where an infant under 14 years of age is seized by descent of lands holden in socage-tenure. – It belongs to the next of kin to the infant to whom the estate by no possibility can ever descend; and if two or more in equal degree are entitled to it, he who first obtains to full age of the infant's person is entitled to the guardianship, except that among brothers, the eldest are preferred, & males among lineal ancestors are preferred to females. – This guardianship extends to the person of the infant, & to his corporeal estate, tenements as well as his socage lands, & is said also to be his personal estate. Bqu. – It lasts only till the ward attains the age of 14 years. Guardian in socage may lease the infant's land & maintain an action of trespass in his own name for injuries done to it. –

Co. Lit. 89. a. note 13.

Ld. 4. Ec. 123.

2. Rol. 41.

Cro. Jac. 98.

2. P. Wms. 122.

4. Guardianship for nurture, takes place only when there is no other guardian. – It extends only to the person of the infant, & terminates at his age of 14 years, & no person but the parents; tho' it is said that when this guar-

dianship devolves upon the mother, & there are fo[illegible] they may have another guardian appointed. –

Co. Lit. 89 note 13. Vaugh. 177–8–9 1. P. Wms. 763. 2. Ves. 129. 135. 2. P. Wms. 110. 3. Atk. 519.

5. Testamentary guardians. These are admitted by Stat. 12. Car. 2. – They may be appointed by the father of the ward by deed or will attested by two witnesses. – The father may do this tho' he is himself an infant. This power of appointing extends over all his children under 21, if unmarried, even to an infant in ventre sa mere; and the appointment may be made to take effect immediately on the fathers death, or it may be given in remainder. – This guardianship may last till 21 or the father may limit it to any shorter period. – It draws with it the custody of the infts person & his real estate & precludes all other guardianships. In C. it is not known. –

Co. Lit. 89. note 13. 2. Ves. 375. 1. Bro. Com. 490. Co. Lit. 89. no. 13.

6. Guardians by election of the inft. – When the inft. has no guardian at all, he may elect one. – But it is said that he must be of the age of 14 years before he can make this election, tho' this is denied in Co. Lit. In C. the age for choosing Guardn. is established by Stat. to be 14 in males & 12 in females. –

7. The Chancellor in Eng. may appoint a guardn. for an inft. & his powers in this respect are very extensive, as he may dismiss any guardian in ha[illegible] upon proper grounds even a parent himself & indeed he seems to have the general superintendence & control of all guardians. –

3. Atk. 531. 14 Ves. 86. 1. & 6. 2. Ves. 192. 3. Hob. 384.

8. The ecclesiastical courts in Eng. claim a right of appointing guardns. in certain cases, but this right is denied & their jurisdiction in this respect is very ill defined & unsettled. –

Guardian & Ward. —

Co. Lit. 89. note 16. Q. Guardian ad litem – Is a special guardian appointed to conduct a suit for an inft. – & he may be appointed by any Court before whom the infant is sued if he has no other guardian. –

Our law, in the State of C., knows nothing of the guardian in chivalry, in socage, testamentary guard.s & guard.s by appointment of the Chancellor or by the ecclesiastical Courts. The only guardian here are natural guard.s, those by appointment of the Ct. of Probate (with or without the election of the inft. as the case may be) & guard.s ad litem. –

In C. the father is the natural guard.n of all his child.n (not in the com. law sense however) & as such is the guard.n of their property & this lasts till 21. – as well as persons. – On his death the mother usually acts as guardian, tho' another person may be appointed by Probate. & this, whether the child is over or under 14 years of age. – If the child is 14 (if a male & 12 if a female) he may choose his guard.n & this choice tho generally regarded by the Ct. of Probate, is not conclusive upon it. – If the father & mother are both dead, & the inft. under 14 (or 12) the Ct. must appoint a Guard.n without any choice by the inft. & this guard.n will continue until 21 unless at the age of election, the inft. chooses another.

Guardian and Ward.

In C. Probate takes security of the guardian for the faithful performance of his duty & to oblige him to account when the ward attains full age, or sooner, if on complaint it should be required of him. — For, in case of danger to the child's estate, the guardian, whether parent or other person, may be compelled, in Ch'y, (in Eng. where his Probate) to account before the ward attains full age. In similar cases Ch'y may appoint another guardian in exclusion of the parent, or require the parent to give bonds to secure the child's estate, & in case of refusal dismiss him — No other person, however, can be appointed guardian while the father is living, unless he is displaced; & even displacing him does not take away his right to the child's person. —

Co. Lit. 88. note G.

1. P. Wms. 703.

2. Mod. 177.

The parent has no right to extend one but of the child's property in his maintenance, the another guardian has. — But for any sum beyond necessary maintenance & education, the parent may also charge the child's estate, provided the purpose be laudable & for the child's benefit, & the means decent; & for extraordinary education, the putting out the child to an ornamental trade &c. — The contradictory positions in the books turn upon the different circumstances of the fathers. —

2. Vent. 353.

1. Ken. 255.

3. Atk. 399. 45.

If any part of the wards property in the hands of the guardian is lost by accident or misfortune, the ward shall bear the loss — Secus, if any fault or imprudence is chargeable upon the guardian. —

Co. Lit. 89.

Guardian and Ward.

3. Bur. 1794. 2. Bl. Reps. 575. Ut. of C. tit. "Equity".

In Eng. inst. mortgagee may, himself, on paym.t of the money due reconvey to the mgor: In C. this power is lodged by Stat. in the hands of the guardian. — The guard.n here has also the power to make partition of lands holden

Ut. of C. tit. "Lands".

by the ward in common, &c. — this is also by Stat. —

If a creditor of the ward wave to accept of the guardian a less sum than is actually due, the ward & not the guard.n is entitled to the benefit of this composition —

1. Atk. 480. 1. Vern. 435. 2. Ed. 342, 295. & Vic. 386. 1706.

The guard.n is considered in Eq.y as a trustee of the ward's estate; and if any person tortiously takes possn. of the inf.t's land, he may be considered by the inf.t as a trustee & compelled to account. —

Guard.n must pay interest for ward's money in his hands unless he can show that int.t could not be procured.

A guard.n having personal property of the ward, must pay all debts & incumbrances upon the ward's estate out of such property, & not out of his own. He also making a charge against the ward. —

The guard.n has no legal right to vest the ward's money in lands. But, if he does & takes deeds in the ward's name, still the latter, when he arrives at pillage may, at his election, accept the land, or demand the money. If, however, he elects to have the money, he will be compelled in Eq.y to convey the land to his guard.n & he will then hold it as his own — If the ward dies, before he attains full age, & consequently without having made an election, his heir cannot take this land but the money must go to his personal representatives.

1. Vern. 483. 435.

Guardian and Ward.

In accounting with the ward, the guard.n is not obliged to allow him more than lawful interest on the principal of his money in the guard.s hands except in one case; that is where the wards money has been directed by Ch.y to be laid out in a particular manner. The guard.n has used it in some other way, as in trade for instance & has made larger profits. In this case as the minors money is exposed to hazard he may elect when he comes of age to take the interest or the profits of the trade as Ch.y may decree.

2. Ves. 256.

The usual method of compelling guard.ns to account in C. is by action of account – in Eng. by bill in Ch.y – ordin.y. In those Ts. they may acc.t with the Ct. of Probate, in C. in Eng. an action of acc.t may be used.

If a guard.n unavoidably lays out money which is depreciating to perish in his hands or to lose a great part of its value he is not liable if he has been guilty of no negligence for any thing more than its value at the time of accounting. & interest, Qu. as to interest? And, if in such case the guard.n from motives of benefit to the ward vests the money in land Ch.y on a bill in eq.y will grant an injunction ag.st a suit instituted by the ward for the money.

4 Co. 188. a.

With regard to the marriage of wards, Ch.y in Eng. exercises a jurisdiction which has never been assumed by the Ct. of Probate, or any other Ct. in C.

Ca. tem. Talb. 55.
2. P. Wms. 111. & 52.
3. Atk. 304.

It is the practice in C. for guard.s to wind out their wards & kinsmen. This is not the com. law of Eng. nor is it authorized by Stat. but has perhaps become our com. law

Of the Settlement of Children.

1. Sw. 169. Str. 580. 745. 2. Ld Ray 1332. Salk. 528. — Generally the Settlement of the father or maintaining parent is the Settlement of the child: — and if such parent acquire a new Settlem.t it immediately becomes the Settlem.t of the child. — By the acquisition of a new Settlement, the old one is lost; for a person can never have but one Settlement at a time tho' he may have a right to more: as if a person having a Settlement in one place, own real Prop.y in another upon which he can reside whenever he chooses without a possibility of removal here he has a right to two but he can never have but one of them at a time. — 1. Sw. 168.

1. Sw. 16. Stat. of 12. — If the father & mother have no Settlement (as if they are both foreigners) the place of birth is the Settlement of the child. — A child may also acquire a Settlem.t of his own by commorancy* & then his derivative Settlem.t (tho' his parents) is lost. — This amounts to an emancipation from his parents, i.e. he is no longer considered as belonging to his father's family. — Marriage & the attaining of full age also effect an emancip.n — and, generally, the contraction of any relation inconsistent with the subordinate situation of a child in his father's family is an emancipation. — Before emancip.n a child may take advantage of any Settlem.t his father obtains, but not afterwards. —

*not however before he is 7 years of age.

3. Burn. 356. Bur. Set. ca. 270. 1. Str. 438. 831. Bur. Set. ca. 638. 3. Burn. 114.

2. Ray. 1473. Bur. Set. ca. 49. Salk. 427. Str. 749. — The father being dead the Settlement of the mother is that of the child. —

A widow by marriage gains a right of receiving of her husb.d, but acquires no Settlement for her children. This rule however seems questionable, for as it respects widows who at the time of their second marriage were able to support their child. — For, in this case the second husband is obliged to support them; & it would seem that they ought in such a case to acquire a Settlement. —

On Settlements.—

If a woman having a Settlement marries a husb.d having none, it is said that her Settlement is suspended during the coverture, but revives again upon the death of the husb.d or dissolution of the coverture. This rule is contradicted in Burrow where it is said that she holds a right to her Settlement even during coverture. There might be a question in such a case, where the Settlement of their children shall be whether in the place of their birth, or in that of the wife's Settlement.

Str. 544. 683.

Bur. Set. ca. 370.

The guardian's Settlement is not that of the ward, for it is as convenient for the guardian to maintain the ward at one place as another.

"A woman having a settlement
Married a man with none"—

Mackston.

Of Master and Servant.

The different kinds of servants in C. are: 1. Slaves. – 2. Apprentices. – 3. Menial Servants. – 4. Day-laborers – 5. Agents, Factors, brokers &c. –

Selk. 505. 1. Slaves are unknown to the Com. law of Eng. & the legality of slavery therefore, in C. must depend upon Stat. or judicial decisions. – 1. Of Stat.-Sanction. There is no Stat. in C. expressly warranting the holding of slaves: But there are several which recognize its existence, & impliedly sanction the practice. 2. Of judicial decisions. – Our Courts have never made an express determin.n that slavery was lawful in C. but many of their decisions like our Cts. count upon it as actually existing, & impliedly acknowledge it to be legalized. – But the slavery thus legalized, is only a right in the master to the perpetual service of the slave, & all the decisions of the Cts. go upon this ground; – they do not consider the master as entitled to the slave, as property, but only to his services; & the only difference between him & another servant is that his time of service lasts thro' life. – Thus it has been holden, that an action of trover will not lie to recover a slave detained from his master; the action must be the same as for the recovery of an apprentice under similar circumstances. – But a slave may be sold or taken in execution. – He may acquire property in any way except by his services; & may maintain a suit by trespass any. – A suit brot by a slave ag.st his master for cruel treatment has been forborne; & where the master sold his slave at a distance, & thus separated him from his wife & family; a suit being brot against him for so doing, tho' there was no decision the Ct. privately advised the master to repurchase the slave, & he did so. →

Tid. St. of C. tit. 2 ch. 4 Emancipation, Peace, Slaves

Singular distinction

2n. Does not the master by consenting to the marriage of his slave, emancipate him, on the ground that he suffers him to contract a relation, from which result duties incompatible with a state of slavery? →

2. Apprentices are servants bound out to a
6. Mod. 182. 2. Ld. Ray. master generally for the purpose of learning some trade
Wms. Salk. 68. or profession; tho' this is not necessary. — An apprentice
must be bound by Indenture & this at Com. Law, is
being almost the only case in which a writing at com. law
was absolutely necessary. — But there is no necessity
Str. 604. for the apprentice's name to be inserted in the indenture,
the person who covenants for him is bound.

Other Servants may be hired by parole; & are entitled
2. Jones. 47. to wages; apprentices are not.

By a Stat. 5. Eliz. minors are empowered to bind themselves as apprentices; but as the minors privilege of avoiding
his cont. is not expressly taken away by the Stat. the Cts.
Cro. Car. 179. Long. have determined that he may avoid this cont. as to any
500. (1718). 5. Burr. other, & therefore if he should leave his master's service,
715. 7. Mod. 15. he would not be liable on his covenants — He is, however
8. Ab. 161. to all intents an apprentice, so long as he stays with the
master; & both are entitled to all the privileges, & incur
all the duties incident to this relation. — As there is
no Stat. of that kind in C. the Com. Law prevails —

1. Mod. 271. By custom of London, a minor may bind himself an apprentice
& is liable on the covenants contained in the indentures. —

Ab. 134. Vaugh. The master cannot by the com. law, assign over his
152. 3. Ke. 519. apprentice to another master, because a fiduciary personal
trust is reposed in the master, by the parent, & personal
trusts are not transferable. On this ground the Ex.rs of
the master after his death, cannot claim his services, & upon principle ought not to be bound to perform the masters covenants respecting the apprentice — It has, however,
1. Lev. 17. denied been holden in one case that he was liable on the cov.t to
to be law in 2 Ld. teach & bound to instruct the apprentice after the master's
1257. — Salk. 58. death; but this decision has been since overruled in a
Ld. Ray. 883. number of cases, & the contrary established. — But the law
still appears to be that he is liable on the covenant
1. Sid. 210. 1. Lev. to furnish diet, clothing &c. this he ought not to be bound
761. 820. Cro. E. to do as he is not entitled to the apprentices services, which
553. —

in the original contract were regarded as the consideration of the master's cost to furnish cloaths &c. Where a premium has been given to the Master at the time of taking the apprentice, it may be more reasonable that the Ex.r should be bound on this covenant, or be obliged to refund a part of such premium. And Ch.y has, in several cases interfered, & compelled the Ex.r to refund a part, where the master died soon after receiving it; & in one case, where the parties agreed that in case of the master's death he should refund £60. Ch.y compelled the Ex.r to pay back 100 guineas, the master having died within three weeks after taking the apprentice.

2. Vern. 64. 1. Atk. 518. 1. Vern. 460.

An award that a master shall assign over an apprentice is void.

2. Str. 1265. Wid. 148. a.

Altho' the assignment of an apprentice is void in some respects, yet the master is liable on an agreem.t to assign an apprentice, if he does not fulfil. So, the apprentice may go to the person to whom he is assigned, if he chooses, & by living with him, will gain a settlement.

Ld Ray. 583. 1. Wils. 95.

The master is bound to keep the apprentice under his own care; he may not put him under the direction & superintendence of any other person.

Hob. 134. 8. Mod. 236. 12. H. 445.

All that an apprentice earns belongs absolutely to the master, & this even if he be only an apprentice de facto, & not de jure. And if an apprent.e runs away from his master, & earns money, this money or any goods purchased with it, belongs to the master; & may be recovered by a proper action, out of the hands of a third person.

6. Mod. 59. 12. H. 415. 6. Lit. 117. Salk. 68. Comb. 450. 1. Ves. 48. 53. Str. 582.

The earnings of hired servants, while in actual service, belong also to their masters: but if a hired servant runs away, & earns wages in the service of another, the master has no claim to the money thus earned; his remedy is by actn. ag.t the servant for breach of contract.

Cro. Jac. 653. 2. Rol. Rep. 269.

Master and Servant.

1. Bl. Com. 450. 3. H. 142. 5 Eq. R. 3. 157. 8. 2. Sw. 65.

or he may have an action against the person employing him if the employer knows him to be the servant of another person; & information & demand by the master, will always be good evidence of such knowledge.

2 Hay. 1117. Salk. 380. Hob. Rep. 105. 2. Leo. 53. Cowp. 552. & Wd. 211. c.

Where a servant is enticed away from his master, service an action lies on the case against the enticer, & also one against the servant for leaving the service.

Co. Lit. 42. b. Fitz. N. B. 168. 1. Bl. Com. 451.

3. Menial Servants, or domestics, may be hired by parole, & if no term of service is fixed upon, it is to be by the Eng. law for a year. In C. such a hiring is at the will of both parties either being at liberty to put an end to it when he chooses.

4. Factors, Agents &c. Lic. Gen. 2 Eq. b.

Of Servants generally.

1. Bl. Com. 450.

The acts of a servant while in his master's business, are generally binding on the master, & are constructively considered as the acts of the master himself.

1. Rol. Ab. 95.

If an innkeeper's servant robs a guest, the master is liable; so, if he sells corrupt wine, the master is liable, but it is said that the servant is not himself liable in this case even tho' he knew the wine to be corrupt.

1. Rol. Ab. 98. Cro. Jac. 223.

If a servant has been cheated, robbed &c. of things belonging to his master, either of them may have an action against the wrongdoer; but an act. by one bars the other.

Master and Servant.

3. Bac. Ab. 503. 1. Bl. Com. 450.

If a servant does an unlawful act by the command of his master both are liable; for the servant is only to obey his master in things honest & lawful. — yet however if the servant was ignorant of the unlawfulness of the act the master only is liable. —

Money gained from the servant belonging to the master by an illegal cont.ct may be recovered back by the master; — not so if the servant has squandered it away, or foolishly extended it. —

Vide. 53.b. 3. Bac. 503.

The authorities are contradictory & some of them irreconcileable as to the master's liability for the torts negligence, frauds & mistakes of his servant. —

2. Ray. 120. 738. 3. Bac. 502-3. Skin. 228. 10. Mod. 109. 5. Dunf. 125.

As a general rule, if a servant, in the execution & performance of his master's business commits a wrong by which in law arises to a third person, the master is liable, & in some cases, the servant also: — vid. infra if he commit a tort totally distinct & not connected with the master's business tho' he may have done it while performing the master's business, he is himself liable & not the master. — Is the master ever liable for a wilful tort of the serv.t committed with force, unless he commanded him? — When the master is liable for the act of the serv.t which is immediately injurious, trespass not case must be brought. —

5. Dunf. 148. 5. Id. 125.

For the negligence of the serv.t, the master is always liable, if this negligence related to his, the master's business: thus for a negligent escape, the sheriff the not the keeper of the goal, is liable. — So for the mistakes of the serv.t the master is liable; & sometimes, the serv.t himself, also. vid. infra.

2. Rol. Ab. 93. Cro. Eliz. 181. Salk. 441. Str. 505. Salk. 272. 10. Mod. 109. 3. Id. 323.

Cro. Jac. 409.
3. Mod. 323.
3. Dum. 75.
5. T. 174.

If a Serv.t is guilty of fraud, in the furtherance of his masters business, the master has sometimes been held liable, sometimes not.— Some of the cases seem to go upon the ground that the master is never liable unless he was privy to the fraud or even commanded it to be done, as where the Master sent his Servant to a fair to sell horses having secret diseases, but gave no direction to sell them to particular individuals, as A. or B. the master was held not to be liable. But this decision was certainly opposed to principle.— I think the Master ought to be made liable in all cases, except where he was entirely ignorant of it & reaped no manner of benefit from it.— (Ought he not to be liable even then?)

1. Rol. Ab. 95.
Perk. 123.

Vide 53.a.
3. Bac. Ab. 553.
5. Dum. 1 & 2. cap. 6. Edwards, 9. H. 7. 25.

The Servant is himself liable as well as the master to the person injured by his torts, in all cases where the tort is committed by him directly & intentionally; not so, if it should happen that he was the mere instrument & entirely ignorant of the ~~[illegible]~~ injury.

1. Br. Com. 45.
2. Ray. 220. 1. Mod. 85.
Salk. 441.
Carth. 58. 1. Show. 29. 101.

When the injury arises from the negligence of the servant, he is himself sometimes liable & sometimes not. The rule of discrimination appears to be this:— If the liability of the master to the person injured (for he is liable in all these cases) depends upon an implied cont. or tacit agreement of his, that the work of his shall be done well, & the Serv.t does it negligently, & that injury accrues, the Servant himself is not liable, as if the Son of a farrier should so carelessly shoe a horse as to lame him, he would not be liable, but the master only.—

1. Rol. Ab. 95. cont.

But if the injury arose from the negligence of the Serv.t in a business in which no cont. or agreem.t on the part of the master could be implied, the Servant is himself also liable, as in the case of the Serv.ts helping a poke of Jack, by carelessly driving his team against it.—

10. Mod. 109.
Salk. 441.
Str. 505.
2. Ray. 739.

Master and Servant. —

1. Vent. 190. 238. To this last rule there are some exceptions; A master of a Ship, who is the Servant of the owners, has been holden to be liable for damages done to goods freighted on board his Ship as well as the owners. — The Serv.t of an innkeeper has been holden not liable for selling contraband wine; but this last case is evidently contrary to principle. —

1. Rol. 95.

If the Serv.t is guilty of any fraud in the business of the master's business he is himself liable if he knew of the fraud — otherwise if he is ignorant of it. It has however been holden in the Eng. Cts. that an Attorney for prosecuting an action of debt, which he knew to be discharged being himself a witness to the discharge is not liable, for it is said "it is in the way of his calling" — Self-interest must have dictated this decision, for it is purely opposed to principle. —

Cro. Jac. 409.

1. Mod. 209.

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If a Servant employs another to do business for his master, & this last one, thro' negligence commits an injury, the first Serv.t who employed him if he had authority thus to employ him, is not liable, but only the master & he who actually did the injury. —

Q. Burnf. 411.

The Postmaster general has been holden not to be liable for the defaults mistakes &c. of Servants employed in his department. Police is the ground of this exception to the general rule. —

2 Ray. 540. Carth. 485. 5. Mod. 455. 11. H. 12. Salk. 17. Comb. 54.

Master & Servant.

When the master not being in fault himself is made liable to the party injured for the losses &c. of the servant, he has his remedy against the servant. For there is, in every contract of service an implied promise on the part of the servant for fidelity & diligence, & whenever his master is made liable for the want of either of these qualities in him, he is liable over to the master. He, however, never engages for his skill or strength, & is not liable to the master for any injury arising from a defect of either of these qualities. The master may have an action against him for disobedience if any injury arise from it.

1 Rol. Ab. 105. Cro. Jac. 255. 1 Sid. 29 8. Str. 1083. 10 Mod. 109-111. 3 Bac. 502.

Of the Master's liability on the contracts of the Servant.

The contracts of the servant, when authorized by the master, are binding upon him, & considered as his contracts, according to the maxim "quod facit per alium facit per se."

This authority given by the master, may be express or implied, general or special. An express authority needs no explanation. An implied one may be gathered from various circumstances; as, if the master has usually entrusted the servant to make conts.

1 Bl. Com. 457. Stra. 506.

2. Vern. 643. Comberb. 450. 2 Ray. 224. 18. Mod. 109. 3. Salk. 234.

of a particular kind - so, if a servant has usually purchased goods or other articles for the master upon credit, the master will be bound to pay for goods thus purchased tho' in a particular case, the serv.t may have had no authority. So if the master should be present while the serv.t made a cont. in his name & should not object he would be bound by it. -

2 Ray. 928. 11. Mod. 72. Brownl. 64. 3. Keb. 625. 2 Ray. 224. acc.

If goods bought by the serv.t come to the master's use, he is bound to pay for them on the ground of subsequent assent. -

Rowd. 11. Stra. 505. 1. Show. 95. 1. Bl. Com. 457.

× If the servant has usually purchased with money, & then purchases upon credit master is not bound to pay, unless the serv.t had express authority so to do. —

Tho' the master, by having usually fulfilled contracts made by the serv.t is bound to fulfil no future cont made by him, yet he may prevent this liability by prohibiting such conts. to be made; but a mere prohibition to the serv.t himself is not suff.t it must be made to the persons contracting with him, or at least a public prohibit.n must be given - the dissolution of the relation of master & serv.t will exonerate the master; tho' not until it has become publicly known. —

Ca. in Law & eq. 110. 1. Show. 95. 2. Vern. 643.

If the servant selling broken belonging to the master warrants it to be of certain qualities, the master is bound by this warranty, unless he has expressly prohibited the serv.t to make it. —

Salk. 280. Stra. 653. 3. Burr. 1405. 5. Bl. 1172. Cro. Jac. 499. con.

Master & Servant.

1. Rol. Ab. 95. Hob. 13.

If the Serv.t in transacting his master's business makes an express cont. of his own, & engages for himself, he is personally liable.

Pre. in Ch. 40. 2. Com. 523.

A serv.t may also, in some instances be made liable on an implied cont. tho acting for the master as when he does not use his master's name.

Doug. 42. Ackworth v. Kempe. 2. Bl. Rep. 832. 3. Wils. 309.

The Sheriff is now holden to be liable for the torts, neglect &c. of his under Sheriff or bailiff, in the same manner that any other master is for another Serv.t. i.e. both he & the under Sheriff are liable for the torts of the latter in the performance of his business as under Sheriff tho' the Sheriff is alone liable for his neglects of duty. When the Sheriff is thus made liable his remedy is upon the bond that is taken. The old authorities are opposed to this, they hold that the Sheriff is not liable for the torts of his deputy.

Cowp. 403.

2. Rol. Ab. 552. Moor 68. Latch. 187. Sav. 90. 107.

1. Haw. P. C. 130. Moore. 245. 3. Bac. Ab. 565.

At Com. Law a Servant voluntarily entrusted with the possession of property, unless it was a mere bare oversight or general superintendence of the property, such as a shepherd has over a flock, or a butler over the furniture of his master, was not guilty of theft, if he purloined that property. 8 Geo. of 21. Geo. 3. made the offence felony in all Serv.ts except apprentices & others under the age of 18.

4 Ed. 372. a.

The late decisions have established it that if the bailee of property is procured by fraud with an intent to steal, it is felony, otherwise not.

Master and Servant.

of the Master's right of Correction.

1. Hawk. 111. 1. Vent. 70. 1. Ld. 176. 3. Bac. 566. Vid. 44. b. 20 Car. — It is laid down in the books, that a master may correct a servant moderately, in the same manner that a parent may a child; & it is to be understood in the same sense; — if the master, in correcting, acts from pure & upright motives, & without malice, he is not to be made liable, even tho' the triers may think the correction misplaced, & perhaps immoderate, considering the offence committed —

Fost. C. L. 262. 5. Mod. 289. Kely. 65.

3. Bac. 566. — A master may correct a menial serv't or day-laborer (in Eng. qu. in C.) for unfaithfulness, or abusive language &c. & he may also correct an apprentice for any viciousness, depravity of morals, bad practices &c. as he has the superintendance of his education, & morals. —

9. Co. 76. — Master cannot delegate his right of correct. to another.

2. Ray. 952. Stra. 953. 2. Lutw. 1481. — A serv't. may justify an assault & battery in defence of his master, tho' he may not in defence of his master's son, or his master's goods. Whether a master may justify in defence of his serv't. seems not to be settled. — The authorities are contradictory — The reason given why he should not is, that he has his action per quod &c. & that is a suff. remedy — but it would be better for the master to be permitted to prevent an injury than to receive recompence for it by action; & it would seem that the rights of master & servant in this respect should be reciprocal. —

1. Rol. 540. Salk. 407. 9. Co. 113. 10. H. 131. Yelv. 80. 2. Rol. 558. Vid. 20 Car.

Of the duty of Executors & Administrators and the disposition of the property of a deceased person.

On the death of a man without a will his real property descends to & vests immediately in the heir. tho' he has but a defeasible estate in it, as it may be taken from him by a certain kind of creditors. — The personal prop. descends to the Administrator, or if there is a will to the Executor who however are only trustees of it for certain purposes. — In Eng. the Ex.r or Adm.r as such have no power over the real estate of the deceased tho' they may however like any other person have the disposal of it by the express appointment of the testator.

The personal property is charged by law with all the debts of the testator or intestate — the real prop.y only with debts by specialty & those of record. — & as these last being considered of a superior kind, are always to have the preference over simple contract debts. & tho' they may resort to the real prop.y they can demand their debts of the Ex.r or Adm.r out of the personal fund if they do, & it is insufficient to discharge all creditors, the creditors by simple cont. are leaft to take their demands without any remedy at law — But in this case Eq. will force the simple cont. creditors to relate by letters then on whose the real estate for so much as the specialty creditors have taken of the personal. This relief is afforded by ordering a sale of the real prop. in the hands of the heir to the amount of the sum thus taken by the specialty creditors & if this sum is not sufficient to discharge all the simple cont. debts it is to be averaged among them equally —

Co: on Ent. 3rd Ed. Tab. 53.

Ib. 54 a.

Cab. 45. 41.
3. Atk. 322.

The Ex.r may prefer any creditor he chooses, to another of equal degree; unless some one by instituting a suit has obtained for himself a preference. — If two or more have instituted suits he who first obtains judgment is to be preferred before the rest.

1. Vk. 420

If an Eng. testator charges his debts upon the real est. the Ex.r cannot be sued at Law to sell the lands & pay the debts: but Ch.y will order him to sell the prop.y & if he fails to obey the Ct. itself, or its officers will sell it. And if the Ct. itself make the sale or the Ex.r under an order from the Ct. the avails of the sale are equitable assets, i.e. to be averaged, if insufficient, among the creditors. But, if in this case the Ex.r voluntarily sell the land without the intervention of Ch.y the money raised by the sale is legal assets, i.e. payable according to rank & priority of claim. 2 Ab. 1 Bro. Ch. 135. 359.
On subject of legal & equitable assets see 2 Tomb. 402.

In Eng. as the land descends to the heir he is said to be liable for specialty debts. But he is not personally liable, & cannot therefore, himself be taken in execution. The creditors claim is ag.st the land only in his hands, and at com. law this idea was so strictly pursued that if the heir had only aliened himself by sale or otherwise, of the lands he was wholly exempted from liability. But the land in the hands of an honest purchaser, could not be come at. The creditors remedy

remedy. But now, by Stat. 3. Wm. & Mary, the heir in case of such alienation, is personally liable, together with his whole estate to the amount of the lands which he has thus aliened. — The same Stat. subjects devisees in the same manner. —

In C. as ~~well as~~ in Eng. the real est. ascends to the heir; the personal prop.ty goes to the heir, & is to be applied to the paym.t of debts &c. — If the personal est. is insuff.t, it is the duty of the Ex.r to represent such deficiency to the Ct. of Probate, who will then grant the Ex.r an order to sell so much of the real est. as is necessary to discharge the debts &c.: and if in this case, the Ex.r will not sell he is personally liable to the demands of creditors. — Before such sale is made of the land, the title is in the heir & any suit, for his rights upon it must be brought by him: but he must account with the Ex.r for the damages recovered. —

In C. no priority is allowed in the paym.t of debts except to those due to government, for funeral charges that be.ch of the deceased. — If the whole estate is insufficient, it is averaged among all the Creditors

See all the authorities on this subject cited 2. Fonbl. 131.

1 Term. 473. 2. K. 337. 6 Vr. Sh. 508. Pre. Ch. 170. 3. P. Wms. 40. 3. Atk. 220. 2. Ves. 91. 102.

At Com. Law the Ex. is considered as residuary legatee in all cases; i.e. after the paym.t of all debts & legacies he is entitled to the remaining surplus of property if there be any. This the law in Eng. gave to him, as a compensation for his trouble, he being entitled to no other. A different rule, however, in America, now obtains:— For if any beneficial legacy is given to the Ex.r in the will, or if from any part of it, an intention can be collected that the Ex.r should not have the residuum, the Ct. of Ch.y will compel him to distribute it to the next of kin as in case of an Adm.r — Any trifling legacy appropriated to a particular purpose, as a ring to remember the testator by, or £10 for a suit of mourning &c. is not considered as evidence of this intention. —

2. Fonbl. 135.

Pow. on Cont. 427. 2. Atk. 58. 226. 1. Wils. 313. 1. Br. Ch. 201. 328. Talb. Ca. 240.

But in this case, parole proof is admissible to shew that notwithstanding such a legacy the Ex.r shall be entitled to the residuum; & this is what is meant by the exception that parole proof is to be admitted to rebut an equity or out.r an implication of law: i.e. it may be shewn by proof that notwithstanding the inference made by a Ct. of Equity in such case that the Ex.r is not entitled to the surplus, the old com. law rule shall prevail, that he is — but this rule does not hold e converso: it cannot be proved that the testator intended the ex.r should not have the surplus altho' he gave him no legacy —

Pow. on C. 438. Talb. Ca. 240. 8 Salk. 306.

By the old Eng. law, if a debtor was made Ex.r, his debt was discharged & the reason assigned in the books is, that he cannot sue himself for it; but tho' this reason might with equal propriety be applied to Adm.rs yet they were never allowed to retain their debts against creditors. — M.r C. supposes that this rule relative to Ex.rs is founded on the above idea, that they

Executors, Administrators &c.

are entitled to the residuum. If as their debt makes a part of the residuum they are permitted to retain it. — If this idea is just it will follow that the Ex^r's debt is not discharged in those cases where he is not entitled to the residuum, that is, wherever he has any considerable legacy in the will — and in this debt will never be discharged, for he is here never entitled to the residuum, he being allowed wages for his trouble as Ex^r. If the reason thus fails it only he should have the residuum. —

If the distribution of the personal property of the intestate, under the Stat. 22 Car. 2.

The Paym^t of debts &c. the Dem^t of funeral charges &c. the Ex^r the remainder to the use the latter is entitled to it is to be distributed according to this Stat., which directs "that of the goods the widow if there are children shall have one third; and the rest is to go to the children of the deceased & their legal representatives, for want of such to the next of kin & their legal representatives; no representation being admitted among collaterals beyond the children of brothers & sisters."

Lowten 15. 73.

The mode of discovering the next of kin is by the civil-law rule which is to count up to the common ancestor of the deceased & the person claiming, & then count down from him to the claimant reckoning one

2 Ves. 213

degree for each generation — This rule applies in Eng. to the distribution of personal property only — in C. it applies equally to all kinds of property. —

Thus, the estate is to go, not to the children & their legal representatives in infinitum; i.e. if any brothers or sisters or children claiming, are dead leaving children, these last representr their parents & take what they would, as if the intestate had at his death one son & two grandchildren, sons of a deceased son, these grandchildr. take by representing their father what he would have taken had he been alive, viz. one half. — But, if all the descendants claiming are in equal degree as if they are all children, or all grandchildr. &c. then they take, no longer per stirpes but each in his own right, per capita — Some contend that the distribution is in this case per stirpes; but the better authorities are the other way. Mr. W. P. thinks that whenever there is no representr. as in this case, the distribution cannot be per stirpes. —

3. P. Wms. 50. 56. Pre. Ch. 28. 1. Atk. 458. 1. Salk. 251. 1. Sw. 235. Lovel. 71. Pre. Ch. 54. 3. P. Wms. 40.

If there be no issue of the deceased the kin is to go to the next of kin in the ascending or collateral lines & their legal representatives — If one person in the ascending & another in the collateral line are in equal degree, they are to share equally neither of these lines being preferred to the other. —

In the Com. law quantity of blood is regarded in determining who shall take the estate; in the civil law propinquity only — Under the Stat. of Car. therefore relations of the half blood take equally with those of the whole —

1. Ven. 310. 323. Lovel. 75. 1. Mod. 206. 2. Ve. 205. 1. Vern. 403. 437. 2. Ve. 12. Carth. 51. 1. Show. 1.

Executors & Administrators &c. Stat. of Distributions

It is an express provision of the Stat. that representation shall not extend beyond brothers & sisters children; as if the deceased left no kindred but nephews & the children of a deceased nephew, those children could not be representing their parent, take what he would have taken — And the Cts. have decided that this prohibition extends to all relations in the same degree as well as those mentioned in the Stat. — thus, if the relations are an uncle, & the children of a deceased uncle, these last can take nothing, for they are not admitted to represent their deceased parent.

1. P. Wms. 25.
Pre. Ch. 503.
1. Ves. 333. —
1. Atk. 454. 527.
3. P. Wms. 50.
2. Ves. 213. 215.

By a Stat. Jac. 2d. the mother is placed in the same degree as brothers & sisters — so that altho' by regular construction she would exclude them, being in the first degree, she is by this Stat. made to share equally with them & she is so far made a constituent part of the old stock of brothers & sisters that if all the bro. & sist. are dead leaving children & she is alive those children shall represent their parents & take what they would have done —

1. Ves. 45.

2. Vern. 341.
2. Ves. 213.

If the father of the deceased is living the mother takes nothing, because whatever she might take, would immediately become her husbands — It must all be given directly to the husband —

If the father & mother have been divorced by Parliament a vinculo matrimonii for subsequent causes it is doubtful whether the mother would be entitled to any thing or not. But as her husbd. right to her personal property has ceased in this case, it would seem, then on principle, she has a good claim — If the divorce were

only a mensa et thoro she would be entitled to nothing, for the husb.ds right to her prop.y still continues — —

3. Atk. 762. Brothers, according to Eng. adjudic.ns wholly exclude grand parents the in equal degree — This decis.n M.r R. believes to be wholly opposed to principle —

1. Ves. 150. 2. Atk. 115. Lovel. 66. & Vid. 39. a. Posthumous children are entitled to a distributive share equally with others, & it is considered as vesting in them while en ventre sa mere — As distribution does not take place till a year after the death of the intestate, such child must always be born before that time. —

Of the distribution of personal prop.y under the Stat. of C.

St. of C. — Real prop.y acquired by purchase in the limited sense of the word, & personal prop.y are both distributed alike under our Stat. — "They are first to go to brothers & sisters of the whole blood, and their legal representatives for want of these to the parents, then to brothers & sisters of the half-blood, and so the Stat. now stands for want of these to the next of kin & their legal representatives." — This position of the words

"& their legal representatives" — Mr. R. believes to be a — . He thinks they ought to have been placed immediately after "brothers & sisters of the half-blood" because in all other parts of the Stat. wherever bro.s & sist.s are provided for, their representat.s are also included, & in no other parts of the Stat. are the representat.s of the next of kin introduced — But what renders it tolerable certain that he is right is that in the next clause it is enacted that no representation shall extend beyond bro.s & sist.s children. & if this last clause is to be understood as it now reads, it is in direct opposition to it for in no instance, under this Stat. can the representatives of the next of kin be within bro.s & sist.s chil.n or the third degree all persons within that degree having been specifically provided for. In distributing the ~~it~~ under this Stat. the relations of the whole blood are always to be preferred to those of the half blood in equal degree & if there are relations of the half-blood nearer than those of the whole the former will take — The computation of next of kin under this Stat. as under that of Car. 2d. is by the civil-law method — —

The only difference, therefore, between the Stat. of C. & that of the 22d. Car. 2d. consists in this: That bro.s & sisters of the whole blood are preferred to parents, & the whole blood is preferred to the half-blood & excludes it in every degree of kindred — And this applies not only to personal property but to all kinds of real property except that which came to the intestate, by descent, devise, or deed of gift from some ancestor or kindred. —

Executors & Adm^rs - Stat. of Distributions. —

3. P. Wms. 49. 2. Conn. 274. 2. Show. 285. The distributary shares, under these Stat.s vest in the persons entitled to them, immediately on the death of the intestate; & therefore, if such person should die before distribution were made, yet his share being transmissible to his representatives, it must be distributed to them. —

Of the advancement of Children. - By a Stat. Car. 2^d every child, except the heir at law, who has received an advancement from the father in his life-time shall, in order to be entitled to a distributive share of his father's estate equal to the other children, bring what he has thus received into hotch-pot; i.e. throw it back into the mass of the estate & then he may receive out an equal portion with the rest: - this, however is at his election; he cannot be compelled to do it. - This rule operates, however, only in those cases, in which the father dies intestate as to the whole of his property. and an advancement by any other person than the father himself, even by the mother, need not be got into hotchpot to entitle the child to a full share of his father's estate -

2. P. Wms. 356.

If a child who has been thus advanced is dead his personal representatives may bring into hotch-pot what in the same manner that their parent might. -

3. P. Wms. 317. 2. Vern. 538. Money expended in the education of a child, or in binding him out as an apprentice has not been considered in the Eng. Cts. as an advance^t altho' it lays a foundation for getting a living. - Mr R. thinks it might be different in Ca. where a good education is

frequently as much as a parent in moderate circumstances can afford to give each of his children.

3. P. Wms. 317. note C. But any thing which yields a present subsistence as a commission in the army &c. is an advancement.

2. P. Wms. 445. A legacy given in a will to one child where there is other property left not disposed of, is not an advance.t

In C. a child who has received any thing by way of advancem.t is not required to bring it into hotch-pot to entitle himself to a distributive share; but such advancem.t is considered in the distribution & counted to the child as a part or the whole of his share as the case may be.

2. Bl. Com. 504-5. A Donatio causâ mortis, is a specific gift of property made by a person in contemplation of

1. P. Wms. 441. 2. Atk. 431. death. It must be made while he is sick & in his last sickness; for, it is always a condition tacked to a gift of this kind, that it is to vest in the donee only upon the death of the donor; if, therefore, he recovers, it belongs again to him. Upon the death of the donor it vests in the donee without the intervention of the Ex.r or any other person.

2. Ves. 431. bec. case on y subject.

To give effect to a donatio causa mortis there must be manual tradition of the thing given by the donor or some act amounting to it.

Such a gift of property is not good ag.t creditors, it being viewed in the light of a fraudulent conveyance as to them; but no action lies ag.t the Ex.r in this case the property never coming into his hands. Mich. Sub. proves that the creditor who claims ag.t the donee must bring his action ag.t him as Ex.r in his own wrong.

3. P. Wms. 350. 2. Ves. 431. Pre. Ch. 300. 3. Atk. 214. 1. P. Wms. 464.

It seems that a chose in action of a negotiable nature may pass as a dona. caus. mort.; but, if it is not negotiable as a common bond it is said that it will not pass tho' the authorities are contradictory. —

* Ibid. 153. a. 168. b.

Why may it not? For Ch. may protect the assignm.t as in other cases. —

Of Legacies.

Pre. Ch. 228.

There is no Stat. of Limitations relative to legacies; they may be demanded of the Ex.r by the legatee at any time. The length of time, however, may be legal, as when taken into consideration with other circumstances to afford presumptive proof of the paym.t of the legacy.

1. Sw. 427. 435. D.

At the death of the testator the inchoate right of the legatee commences; but the legal property of the legacy still remains in the Ex.r, & his assent is necessary to vest the legal property in the legatee.

No particular words are necessary in a will to give a legacy; any thing from which the testator's intention can be collected is sufficient, that being the pole-star which is to guide in these cases —

Executors & Adm.rs — Legacies. —

2 Fonbl. 351. note

With respect to the description of the person of the legatee it has been decided that if a testator gives a legacy to the children of A. those children only are to take who were in esse at the time of making the will & not those born afterwards tho' during the testator's life. But in this case if A. had no children at the time of making the will all the after born children take equally; for this is presumed was the intention of the testator. —

2 Vern. 105. 545. Co. Lit. 112. Pre. Ch. 470. 2 Ves. 83.

2 Vern. 545.

If the legacy is to the children of A. & B. & A has two children & B. three, they are all to take, by equality, & not the children of A. one each, & those of B. the other two.

2 Vern. 100. 1 Ves. 111. 201. Duing. 23. 24.

If it is given to the children of A. & he has no children either at the time of making the will or afterwards but has grandchildren, they are to take; for otherwise it would be impossible to effectuate the testr's intent.

1 P. Wms. 244.

A legacy or provision for younger children means those other than the heir, tho' they may perhaps be older than him. —

2 Fonbl. 350.

Pre. Ch. 401. 1 P. Wms. 32. 2 Ves. 52. 1 Ves. 221. 2 Bro. 351. Pre. Ch. 332 a.

Where property is given "to my relations" or "to my poor relations" &c. it has been held that it is to be divided according to the stat. of distribution, it being impossible to give in all the testator's remote relations, as they might amount to hundreds. —

1 Salk. 237. 1 P. Wms. 424. 5 T. 5. 5 T.

Personal property acquired after the making of the will will pass to the legatee, if the words of the will embrace it, as "all my personal property" &c. The rule as to real property is directly the reverse, no part of that passing, except that the test. had at the time of making the will, unless there was a republication. —

Pre. Ch. 330. 2 Vern. 588. 1 P. Wms. 59.

A bequest of all a man's pers.l prop.y in a particular place, comprehends all that is there at the time of his death.

On the impact of words in a will as it respects the personal property carried by them See 2 Fonbl. 333 & 344.

3. Atk. 201. 220. Pre. Ch. 249. 307. 251. 1. P. Wms. 425. 3. Ib. 334. 2. Vern. 512.

A sum of money was held not to pass under a bequest of "all my goods, chattels, furniture & other things at Luck a Blair". So, a library of books was held not to be comprehended in the term "furniture". But all these cases go upon the ground of following the testator's intention & in other cases it might be different.

2. Vos. 430.

It is a general rule, & perfectly reasonable that the same words which would pass articles in a dwelling house would not pass them in a shop or trade.

2. Vern. 638. 1. P. Wms. 425. 2. Ib. 419. 3. Atk. 369. Amb. 605.

Plate will pass under the description of "household goods" or not according as the rank quality, or fortune of the testator made it actually an article of household use, or only a mere article of ornament & show.

1. Atk. 372.

Personal ment.s will sometimes go under a devise of real & vice versa; but this is only in those cases where, there having been an agreem.t to convert one species of property into the other, it will consider this agreem.t as actually performed.

2. Fonbl. 347 n. 1. P. Wms. 597. Amb. 641. 1. Eq. Ca. Ab. 201.

In determining what property passes by a bequest, the will is to be considered as speaking at the time of its date, & not at that of the testator's death, unless the bequest be of a species of prop.y fluctuating in its nature, as a flock of sheep, or by a collective term, as a library, in which cases the property as it stands at the time of the testator's death, passes.

2. Fonbl. 330.

2. Lev. 408. Pre. Ch. 394. 2. P. Wms. 132. 3. Ib. 353.

It was formerly a rule that if a man gave a legacy to a creditor it should be considered as a satisfaction of the debt, if it was equal or superior in value to the debt but not otherwise. But the Chancellors early laid hold of particular reasons for taking cases out of the rule, & it was held 1. That the legacy in order to operate as an extinction of the debt, should be ejusdem generis with the debt. 2. That it should be payable at the same time or at least as soon. 3. That there should be no clause in the will "after all my just debts are paid". 4. That the rule should not apply ag.t an illegitimate child. 5. And at last That it should be whether there is in the will, in payment of the debt, or it should not be construed.

2. P. Wms. 610. 355. 1. Ib. 410. Pre. Ch. 240. 138. 230. 1. Vos. 521. 2. Ib. 409. 630. 3. P. Wms. 22. 2. Atk. 415. 300. 3. Atk. 65. 93. 1. Bro. Ch. 129. 295.

So that the old rule is not an arbitrary one, as it seems previous; but as it respects volunteers, the old

Executors & Devisees — Legacies.

1 Ch. Ca. 2 Vern. 332.
Pre. Ch. 263. 138. rule is still operative: for, if a legacy is given
2. Term. 555-6. 115. to a wife or other person entitled to money from
1. P. Wms. 324-5. the testator by articles of marriage settlement &c. it is
generally considered as intended to be a satisfaction
in bar, or in lieu of what is thus due; if it appears to be the testr. intent that it should be so considered; & tho
the legatee may have her election as to which she
will take, she cannot have both. —

If the same legacy is given to a legatee twice or more times in the
1. P. Wms. 423-5.
1. Br. C. C. 425. 380. same instrument, in the same words, it is merely a repe-
tition, & he can take but one of them — But if it is
in a different instrument, as a codicil or a different tm
it is cumulative & the legatee takes both — These deci-
sions are grounded on the intention of the Testator. —

Legacies may be vested or contingent. —

A vested legacy is one that vests in the legatee on
the death of the testator — A contingent legacy is one
2. Fonbl. 368.
Cowlap. 203.
2. Term. 521.
that for some reason never vests in the legatee but
lapses or falls back into the mass of the testator's
property, & if there is a residuary legatee goes to him,
or if none it will go according to the Stat. of distrib.
to the next of kin — If the legatee dies before the
testator his legacy lapses; & in this case it has been de-
cided both in Eng. & C. that it shall not go to the
residuary legatee if there be one but to the next of kin —
If it lapses after the death of the testator as if there
2. Term. 394-5.
be a condition annexed to the legacy which the legatee does
not perform & thus forfeits the legacy it goes to the re-
siduary legatee.

1 P. Wms 274. 3 M. 113. Pre. Ch. 470. 2 Vern. 207. 511. 521. — If a legacy is given over to another, upon the event of the legatees dying before marriage or before a certain age &c: this limitation over is good. —

1 Ves. 135. 140. 2 Vern. 468. If legatee is only a trustee, legacy does not lapse, if he dies before the testator. Lubbatan

2 Vent. 342. 2 Salk. 415. Carth. 52. Str. 820. 935. 1 Ves. 542. 3 Atk. 43. — 1 Vern. 255. 402. Pre. Ch. 21. 2 Vern. 31. 199. 283. 417. A legacy given to A. now i.e. immediately on the testator's death & payable at a future day is a vested legacy, & if he die before that day it must then be paid to his representatives; for a vested legacy on the death of the legatee goes to his representatives. — But if given to him when he attains a certain age or at a certain age, & there are no words importing a present donation, the legacy does not rest till he arrives at that age, & if he dies before the time specified the legacy lapses. — Yet, if interest is made payable by the tes.r on the legacy let the words be what they may it is a vested legacy — So if it be charged on lands, let the words be what they may it lapses to the heir or devisee, if the legatee dies before the time specified. —

2 Vern. 673. 2 Ves. 263. 3 Atk. 645. 2 P. Wms. 276. 510. 1 Vern. 204. 324. 1 Atk. 552. Pre. Ch. 317.

Lovelap's 159. Legacies given upon conditions are good if the condition be a lawful one; if it is illegal or impossible to be performed the legatee takes the legacy without performing the condition. —

1 Fonbl. 249. 252. Conditions inserted in legacies in restraint of marriage are generally void because contrary to found policy; as if a legacy be given to a woman on condition that she do not marry a mechanic or a merchant &c. — But there are exceptions to this rule. — If a husband having children, give a legacy to his wife upon condition that she do not marry again after his death, this cond.n is good for it may be necessary for the good education &c. of the child.n that she remain a widow. — Also conditions restric-

1 Vern. 20. 1 Mod. 85.

1. P. Wms. 285. 1. Tonbl. 249 4. 1. Vern. 20.

live a marriage, before a certain age, if it be reasonable or not to marry at a particular time have been adjudged good; as also a restriction against marrying a Papist.

1. Vent. 199. 1. Atk. 502. Pre. Ch. 555. 1. Vern. 20. 1. Tonbl. 249-252.

A condition annexed to a legacy, that the legatee shall marry with the consent of a particular person is considered as being merely in terrorem, & of no effect, unless given over to another in case the legatee does not comply with the condition. In this latter case the legatee must comply or lose the legacy.

A legacy given to several, will go entire to the survivors, if either of them dies before marriage, or before the age of 21, but not otherwise.

2. Vern. 513. 1. B. 153. 1. Ib. 56. 355. 414.

Where money &c. is given to the Ex.r or other person as a trustee to distribute among chil.r or other legatees, at his discretion, a Ct. of Eq.y will compel such trustee to make this distribution without partiality, & without abusing the confidence reposed in him.

1. P. Wms. 285. 2. Atk. 81. 5. Co. Rep. 29. 4. Ib. 25.

If a legacy is given to an infant & the Ex.r pays it to the father of the infant it is at his own risque; for if the father squanders it away or spends it the Ex.r will be liable to pay it a second time. The rule is the same if paid to a guardian unless it be a testamentary guardian appointed by the testator himself for his children.

The Ex.r in this case must retain it in his own hands till the legatee attains full age; or, he may apply to Ch. & procure an order from them to pay it, & then it will be perfectly secure.

2. Vern. 261. 659. A legacy to a feme covert must be paid to her husband unless given to her sole & separate use.

2. Salk. 415. If no time is appointed by the testator for the payment of a legacy, it is payable at the end of a year from his death.

2. Vern. 31. 199. 283. The person entitled to a lapsed legacy may demand it immediately after it lapses, provided no time is fixed for the payment by the testator.

2. Atk. 108. 1 Ves. 308. Pre. Ch. 11. Pohl. 104. Salk. 415. Interest is payable on a legacy after a year, if demanded of the Ex.r. If the legatee be an infant it carries interest after that time without demand.

Salk. 415. Pre. Ch. 11. 151. 1 Vern. 251. 260. If the legacy is appointed by the testator himself to be paid at a certain time, it is not fully settled whether it shall bear interest from that time whether demanded or not or whether only from the time of demand. But the modern authorities favor the opinion that the interest commences from the demand only.

2. Ven. 340. 2. Atk. 329. 3. Ib. 101. 58. If a legacy is made payable to a child of the testator even at a future time & no provision is made for its maintenance, it will bear interest from the testator's death. This rule does not extend to an illegitimate child. 1. Ves. 310.

2. Pl. Ms. 20. Where a legacy is [illegible] or mortgage carrying interest which yields interest as bank stock &c. or if it be secured upon land which yields rents & profits the legacy carries interest from the death of the testator whether expressed in the will or not.

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Executors & Admin.rs Legacies.

1. Salk. 249. 250. 3. P. Wms. 322. 2. Vent. 349. 3. Br. P. Ca. 290. Pr. Ch. 61. 1. Ves. 51. 7. Co. 510.

If the testator charges debts upon land yet the personal estate is first to be exhausted in their payment even to the exclusion of legatees. But in such case Ch.y will lay in the legatees upon the land to the amount of debts thus charged which have been satisfied out of the personal fund.

Pow. on Mort. 377. 384.

General legatees are bt. in ag.t reversions tho' ~~they~~ not ag.t specific devisees; but they are bes. hab. in all cases ag.t the devisee of a mortgaged estate, if the mortgage has been paid out of the personal fund.

2. Vent. 358. 3. W. 2. Vern. 205.

The Ex.r is not obliged to pay any legacy till the legatee gives security to refund if debts should afterwards appear: for the trust of an Ex.r is eternal, he is bound to lay all assets of the testator after he has once had assets in his hands ready for that purpose.

1. Vern. 94. 453. 2. W. 205. 2. Vent. 358. 7. Co. 70a.

If he does pay a legacy without taking security, & there should afterwards be a failure of assets to pay debts or other legacies the Ex.r cannot compel the legatee to refund but must pay out of his own pocket. L.d Mansfield Comp. 287. states expressly that it might be recovered back on this ground. — It seems it ought to be consid.d as money paid by mistake, & thus recoverable in act.n of indeb. ass.t.

1. Vern. 94. 2. Vent. 360. 2. Ves. 63. 2. Vern. 205. 7. Co. 70a

If the Ex.r is a bankrupt & unable to pay those debts or legacies the Creditors or legatees may come upon such legatee in Ch.y & compel him to refund. May they not, if Ex.r is not a bankrupt.

2. Vern. 205. Loveland 210.

The above rule however does not obtain if the Ex.r when he paid the legacy was ignorant of the existence of debts afterwards at hearing; or if he is compelled in Ch.y to pay them.

It is the duty of the Ex.r to retain assets for the paym.t of debts in presenti, solvendis in futuro. If the Ex.r having thus retained assets becomes a bankrupt before paym.t it is somewhat doubtful whether the Creditor

can pursue the assets in the hands of legatees & devisees. It seems reasonable, however, that he should. It has been thought in C. that in these cases, the creditor ought by bill in Ch. to call in all the legatees & devisees that his demand may be taken from them all in proportion to their respective shares.—

Of Specific & Pecuniary Legacies.—

2 Fonbl. 374.

Specific legacies are bequests of particular things distinguished from the testators prop. in general. Pecuniary legacies are bequests of sums of money made in general terms. If a particular parcel of money is identified, & pointed out as being in a particular bag or drawer it is a specific legacy. Courts lean agt considering legacies specific. Amb. 310.

1 Atk. 508. 10 P. Wms. 540. Amb. 310.

Pecuniary legacies are liable to creditors before specific. but the latter are also liable if the other assets are insufficient. If a specific legacy is made use of for the paym. of debts, & there is other prop. left after paym. of all debts, the Ex. must recompense such legatee out of this prop. So if it is taken by a creditor an ex. rule is the same. For specific legatees must be recompensed at any rate if there is a sufficiency of assets for that purpose. & this too at the expence of pecuniary legatees.

Cro. Eliz. 407. 1 P. Wms. 422. 1 Vern. 31. Salk. 415. 2 Vern. 111. 088.

If a specific legacy is lost or destroyed thro unavoidable accident the legatee must bear the loss & is entitled to no recompence.

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Executors and Admin.rs Legacies.

Pre. Ch.r 392-3.
2. Br. Ch.r 125.

If the whole personal estate has been given out in specific legacies, & then a pecuniary legacy is given to be paid out of the pers.l estate, which is already disposed of, the specific legatees are charged with this legacy. Must not the same be in this case?

If there is not a sufficiency of assets to pay all the pecuniary legacies, they must proportionally abate among themselves. This rule has been so strongly adhered to as sometimes directly to contravene the intention of the Testator. — If one legatee has received his whole legacy, & there is not enough to pay all the rest, the Ex.r is personally liable; but may oblige such legatee to refund. Cas. p. 287.

1. Vern. 31.
Fitz. 5. a. Ex.r

1. P. Wms. 422. 540.
1. Vern. 31. 2. Ca. in Ch. 171. cont. 2. Bl. Com. 51.
Pre. 2. Vern. 111. 088. 13. Mk. 416.
2. Ca. 195.
1. Atk. 505.

With respect to the abatement of specific legacies, when a part has been taken for creditors, & no assets left to reimburse them, the authorities are contradictory. But Atk. thinks that in justice & equity they ought. They are not to abate in favor of pecuniary legatees, as they are preferred to them.

of Ademption of Legacies.

2. Mon. 367.
Cooth. 205. 1. Atk. 416.
2. Br. Ch. 105.
2. Bac. 470.

The accidental destruction of a specific legacy, or incumbrance of it by the testator in his life time, may be an ademption or not according to circumstances i.e. a revocation of the will as to that particular legacy, or a taking it away from the legatee. To determine this, the intention of the test.r must be sought: If the alienation

Ibid. 319.b. cannot be accounted for but upon the supposition that the test.r intended to take away the legacy, from the legatee it is an ademption. But if the legacy is so lost or disposed of, that no such intention can be inferred it is no ademption. — If if the thing bequeathed is pledged by the testator as full security, there is no ademption. If a debt which is bequeathed away is called in by the testator, for no discoverable reason than to take it away from the legatee it is an ademption. But if the paym.t is unsolicited by the testator, or if he is compelled to enforce it, by the failing circumstances of the debtor, or if he is in want of money &c. the receipt of the debt is no ademption but the Ex.r is answerable for the value of it.

T. Ray. 335. 2 Vern. 631.

2. Vern. 15. 3d. 1. Ch. 95. Ch. Ca. 263. 1. Br. Ch. 680. 2. Atk. 216.

A pecuniary legacy may be ademed on the same ground the intention of the Testator; as where he gave a daughter in his will £200 as a portion & afterwards, before he died, gave her the same or a larger sum, it was held that this was an ademption. An advancement of a child to whom a legacy in a will has been previously given is an ademption of the legacy — tho' this implication is always open to be rebutted by evidence shewing a different intention in the testator.

2. Atk. 491. 516. 1. Br. Ch. 425. 2. Ib. 499. 165 - 519.

5. Durn. & E. 590. 406. 205.

In Eng. the mode of recovering legacies of the Ex.r is by libel in the ecclesiastical Ct. or by a bill in Ch.y. If the legacy is charged on lands the latter method only can be pursued. If land is devised to a devisee, & he is charged with the paym.t of a legacy out of it he may be sued for it in the Com. law Ct. being considered as a debtor to that amount. — Ch.y interferes in these cases, upon the ground of its being a trust in the Ex.r which they are bound to be fulfilled.

2. Show. 50. Salk. 415. 6. Mod. 20. 2. Ken. 6. 3rd. Pro. Jac. 2nd. 9. & Ann. 120.

Ibid. 180.b.

In C. a legacy is sued for & recovered before the Com. law Ct. like any other debt.

Executors & Administrators. —

Of the appointment of Ex^rs & Admin^rs & the persons entitled to Administration

The Ex^r is appointed by the test^r himself in the will, & by the Eng. law is not ordinarily obliged to give bonds for the faithful performance of his duty. But Ch^y will compel him to do it, when there appears to be danger from his bankruptcy or mismanagement, or when he has rights to pay at a distant future time.

3. P. Wms. 33^n.
2. Atk. 213.
3. Br. Ch^y. 365.
1. Atk. 101. Ct. of Ch^y will sometimes appoint a Receiver, when Ex^r is a Bankrupt.

If there is a will made & no Ex^r appointed, an Adm^r cum testamento annexo must be appointed. In this appointm^t the Ct may take any discreet person.

2. Bl. Com. 500.

If the person died intestate, the Stat. 21. Hen. 8th directs that admin^n shall be granted to the widow

1. Salk. 36.

or next of kin; who, by Stat. 29. Car. 2d is obliged to distribute the publick of his p^rs remaining after payment of debts. At Com. law the Ordinary or Bishop had the

1. Bl. Ab. 910. Cu. Ca.
106. Toll. 12^n. S.

absolute disposal of the intestate's goods, without liable to acc^t to any one whatever he was first judged to put in power of Cred^rs by Stat. Westm. 2d. 13. Edw. 1.) —

In the construction of the Stat. Hen. 8. it has been

1. Str. 532.

held that adm^n may be granted to the widow or next of kin, or to both, at the discretion of the ordinary. —

Stat. of C. is in the same words & the construction of it has been the same. —

Two or more adm^rs may be appointed, if the Ct judge it expedient; or adm^n of different parts of the estate may be granted to different persons, if necessary. —

1. Bl. 908. Salk. 36.

If there are several who are next of kin to the

2. Bl. Com. 500-8.
Salk. 38.

intestate the Ct may appoint any one, or more, or all at its discretion — Half blood are equally entitled with the whole

2. Vern. 124.

Next of kin in the descending line are preferred to those in the ascending. —

2. Vern. 125.

Salk. 36-8. If the next of kin is deficient in understanding or a bankrupt &c. Ct. may appoint another. — If the widow & next of kin refuse to accept the adm.on, creditors are considered as entitled to it next; & if they refuse or are incompetent Ct. may appoint any discreet person. —

Hob. 250. 5 Co. 29. 2 Bl. Com. 507. Comy. Rep. 159. 39-5. Mod. 365. If the adm.on belongs to an infant the Ct. must appoint an Adm.r durante minore ætate of the inf.t i.e. till he arrives at 21. — So if the Ex.r is under 17. adm.r durante &c. must be appointed which lasts till 17. — In making these appointments, the next of kin are not regarded. —

Vaugh. 152. 2. Bl. Com. 510. If an adm.r dies before the estate is settled, another adm.r de bonis non must be appointed & here too the next of kin are not regarded. If an Ex.r dies in similar circumstances leaving an Ex.r, the trust devolves upon him, but if he dies intestate, it will not go to his adm.r but adm.on de bonis non must be granted to some one. —

Tabl. Ca. 127. 2. Vern. 514. 1. Rol. 907. If of two or more Ex.rs or Adm.rs one dies the authority survives to the others, the trust being considered joint & several. —

9. Co. 37. Ca. El. 92. 4. Burn. 555. If several Ex.rs are appointed & any one refuses to accept the trust, the others may go on & act as Ex.rs; & this refusal is no objection to the one who refuses, coming in & acting as Ex.r at any time afterwards if he chooses — Notwithstanding a refusal by any one he must be joined in a suit by the Ex.rs with the rest; the in a suit ag.t them he need not. — In C. the acting Ex.r alone sues & is sued. —

Salk. 301-6-7. 11 Wms. Off. of Ex.r 39. Ex.r after having done any act if would make him Ex.r as respects liab. cannot refuse the executorship.

Off. of Ex.r 36-7. An Ex.r or Adm.r after being notified of his appointment must appear & either accept or refuse. If he neglects, he is in Eng. excommunicated. In C. he is to forfeit 1/2 Doll.s per month until he does it. —

Salk. 35. Ex.r or Adm.r may be refused for the same reasons for which they would not have been originally appointed.

72.b.

Executors and Administrators.

2. Rol. Ab. 907. Lovel. 19. 20. 50. 2. Bac. 411. + Vid. 234. b.

If an adm.r is appointed & an Ex.r afterwards obtains with a will, adm.on must be repeated, & the adm.r renders to the Ex.r whatever he has of the testator's prop.y in his hands. And it is doubtful whether in C. the whole proceedings of the Adm.r in this case are not absolutely void. In Eng. if the Adm.r has paid debts &c. which the Ex.r would have been obliged to pay, the Adm.r is allowed them. — in. if adm.on was obtained dishonestly, & not by mistake. See in 3. Burn. 125. the distinction between the forged will of a dead person & the forged will of a living person, thought to be dead. —

2. Fonbl. 390.

1. Salk. 42. 4. Mod. 15. 2. P. Wms. 570. 2. Fonbl. 387.

Temporary administr.n may be granted if the person appointed ex.r is beyond sea, and in some cases, until the ex.r if present, proves the will.

It is a question in C. whether an infant Ex.r is liable on the bond which he is obliged to give. — In E. he ~~hoses~~ he must be in contradiction to the general principles of the com. law, for if he is not the Stat. requiring him to give bonds is entirely nugatory. —

1. Salk. 400.

If there are two or more Adm.rs receipts, discharges &c. must be signed by all. — But the act of one Ex.r being the act of all, signature by one is sufficient. — This distinction is not adhered to in C. —

Who may be an Executor.

An infant may be an Ex.r but he cannot act as such till 17. & after that age all acts which in other Ex.rs would be a devastavit are not binding upon him. — An Adm.r must be 21 before he can act. —

Cro. Car. 490. Moor 852. Co. Lit. 172. a. 204. 5. Co. 27. 1. Burn. 328.

No crime will exclude a man from being an Ex.r tho' an excommunicated person cannot be one by the Eng. law.

Co. Lit. 128. 134. a. Cro. Car. 8 – 9.

An alien ami may be an Ex.r & it is even said to an alien enemy may, that he may sustain actions as he sues in the right of another, but the authorities on this point are contradictory.

Cro. Car. 8 q. 2. Vern. 124. Cro. Eliz. 142. 683.

Of those actions which will survive, in favor of, & ag.t Ex.rs & Admin.rs

There are certain actions which the testator or intestate might have maintained which his Ex.r or Adm.r cannot, & there are also some, which might have been maintained ag.t him, that will not lie ag.t his Ex.r &c.

With respect to those in which the Ex.r or Adm.r is liable, it has been laid down as a rule in the books, That on all contracts of the deceased, they were liable, & that for all torts they were not. — Neither part of this rule is strictly true. As it respects torts it appears to be now established, That if a tort committed by a test.r or intestate, has benefited his estate, the Ex.r or adm.r is liable; otherwise not; let the damage to the injured party, be what it may. Thus if the deceased has cut down the timber trees of another & carried them away, his Ex.r &c. is liable on the ground that his estate has been benefited; but if he had only cut them down, & left them, without carrying them away, no action would lie ag.t the Ex.r. — So, with respect to all personal torts as, assault & battery, slander &c. the maxim applies "actio personalis, moritur cum personâ." — This maxim, at com. law extended to all torts whatever; it is under the equity of the stat. Edw. 1.st 13 as restrains & limits, that the present rule is established.

Cow. 372. 3. Burr. 549.

But, when a right of recovery, for the torts of the test.r or intest. does survive ag.t the Ex.r or adm.r the action that ag.t the latter must not sound in tort, but in contract; therefore, an action of trespass will not in any of these cases lie ag.t the Ex.r; it must be an action of assumpsit.

Cow. 372. 3. Burr. 549. Wms. 218.b.

On the contracts of the Testator the Ex.r is generally liable, but there is one case which is an exception: These are where, according to the cont. the test.r

was not to receive any consider.ⁿ moving from the other party, but a compensation arising solely from his performance of the cont. & in which the other party is not interested; here, if he fails thro' mere negligence, his Ex.ᵗʳ is not liable: As if an officer who is to receive legal fees from the execution of a process, fails thro' negligence to execute it &c. So, the Ex.ᵗʳ or adm.ᵗʳ of a sheriff is not liable for an escape, upon the same ground: But the Ex.ᵗʳ &c. of a common carrier is liable, because he can demand com.ᵗ pens.ⁿ for his services from the person for whom he transacts his business & indeed generally looks to him for it; whereas the sheriff's compens.ⁿ depends wholly upon the prisoner himself, & not upon the creditor for whom he keeps him & when he has escaped he has lost all remedy. — This exemption from liability of the Ex. or adm.ᵗʳ has been extended in C.ᵗ to the case of an Attorney who receives an oblig.ⁿ to collect, & fails to do it. case of Mr Canfield.

5. Co. 82. 1. Ro. 30.

An Ex.ᵗʳ when sued as such cannot be held to bail. Pro. Jac. 350. Pro. Car. 59. & a writ of error brt by an Ex.ᵗʳ is a supersedeas to the exⁿ on the first judgmᵗ without any bonds. — Ed. 221. a.

In some instances also, the ex.ᵗʳ or adm.ᵗʳ cannot maintain an action which the test.ᵗʳ or intestate could. The rule is, That if the tort committed ag.ᵗ the test.ᵗʳ or intest. has injured his effects, the Ex.ᵗʳ &c. may maintain an action for recovery of damages; otherwise he may maintain an action on all contracts. — Ed. 218. b.

4. Burr. 2180. Str. 1271.

An Ex.ᵗʳ cannot join in one declⁿ a cause of action which accrued to him as ex.ᵗʳ with one which he has in his own righ

Executors and Administrators.

9. Co. Rep. 5. If an adm.r dies after judg.t obtained in favor of his intestate; the adm. de bonis non must bring a fieri facias. In this case the Ex.r of the adm.r cannot sue out an ex.on on the judg.t because he is not subject to the pay.mt of the debts of the first intestate; & no other than such person can have ex.on on that judgm.t.

Po. Jac. 229. Yaw. 168. 4 Dunn. 281. 2 Rs. 645. It is a rule of the Eng. law that an Ex.r is not liable to pay costs when he brings forward an action as such even tho' defeated of a recovery. These cases are all those where the right of recovery accrued in the life time of the testator. But if the right originated or was completed in the time of the Ex.r tho' it relate to property of the test.r he may sue in propria jure, & then he is liable to cost. And in these cases where he may sue in his own right if he does not but sues as Ex.r still he is liable to cost.

Ab. 182. 3. 3 Ar. 1851.

Sut. 79. 1 Ven. 92.

In C. Ex.rs stand upon the same footing as to the paym.t of costs as other persons. They are however always allowed them out of the estate if they have conducted reasonably in the business.

Of Assets.

Generally, all property of the deceased that comes into the hands of the ex.r or adm.r is a fund for the paym.t of debts &c.

Emblements descend to the Ex.r. Have therefore assets.

Things affixed to the free hold as cranes, furnaces, coppers for dyers &c. in the old com. law were in all cases considered as belonging to the realty,

Executors & Administrators. assetts. –

3. Atk. 13. This rule is now much altered as between lessor & lessee, for they are considered as being personal prop & therefore belonging to the latter, unless so annexed to the free hold that their separation would materially affect it. Between heir & Ex.r however, the old rule obtains & they are not assetts.

Co. Lit. 47 a. Aiders. Q5. 1 Ven. 191. 2. Saund. 30. Hob. 282. Salk. 79. Rent accrue at the death of the test.r is assetts; but that which accrues after his death belongs to the heir & not to the Ex.r. If a lessee lets out his leasehold lands to an under-lessee the rent payed by this last is ness.y pro. & goes to the Ex.r of the first lessee. –

Cro. Eliz. 712. If lessee dies possessed of a term for years it goes to his ex.r or adm.r & the exors of the assetts derived from the land over the rent due for it is assetts in their hands.

1. Rol. 920. Hob. 290. All reversions however distant in point of time are real assetts in the hands of the heir: & Creditors may go ag.t him, to be levied quando accederint. –

Hob. 290. An Equity of redemption, in Ch.y is assetts in the hands of the heir, but not at law. –

Hob. 38. All monies recovered by the Ex.r on the contr.s of the testator, whether they became due before or after his death, & all damages for the breach of covenants or for torts done to the testator's prop.y are assetts. –

Salk. 79. If the debt due to the testator was not for his own benefit, as if it was due to him as trustee for another, it is not assetts when recovered by the Ex.r.

Hob. 83. Where the testator has in his life-time made a conveyance of his prop.y which is fraudulent as to creditors & therefore void as to them, still this is not assetts in the Ex.rs hands, for he can never avoid the conveyance as being good ag.t the grantor & his representatives. – The creditor's remedy in this case is by suing the fraudulent grantee as executor in his own wrong. –

Ex^rs or adm^rs are bound for their testators or intestates to the extent of the assets they have received only. And if they are sued after having paid them all out, they must plead "plene administravit," & this will screen them from the demand, unless they have paid debts out of their proper order, or committed a devastavit.

Fid. 2^d

Of the Order of Debts.

3. P. Wms. 402. Talb. Pl. 2 Ven. 524. Talb. 149. 1. Atk. 5th

Debts due by the dec^d are ranged & payable in Eng. in the following order. 1. The ex^r or adm^r must pay the funeral expences. 2. Debts due to the crown. 3. Judgment debts, or those due by record. 4. Debts due by recognizance or confession. 5. Specialty debts. 6. Debts on simple contracts.

2. Vern. 3rd. 85.

These debts must be paid in this order by the Ex^r & if he pays one of an inferior rank, having notice that a superior debt is due he must pay this last at all events whether there are assets or not. Of debts in equal degree, he may pay which he pleases first, unless some one has obtained a priority by legal diligence. But he may not pay a debt which is not yet due to the exclusion of one that is now due.

2. Ray. 580. 1. Wils. 258. Ff. of Ex: 111.

1. Rol. R. 922-3. 10. Mod. 406.

He may retain his own debt in preference to all other creditors in an equal degree.

If the Ex^r is sued on a simple cont. debt, & he has assets in his hands to the amount of a specialty debt unpaid, he pleads this specialty & that he has not assets ultra: if he has paid the specialty debt he pleads plene administravit.

1. Atk. 292. Lord. 3. P. Wms. 222. Com. Rep. 255.

A recognizance bond is postponed to all debts, but preferred to legacies.

If a creditor objects to the bond, it is done even in the deceased on the ground of its being voluntary,

2. Vern. 37.

(i.e. without consider.) or on the ground of its being fraudulent. The Ex.r may be held, bring the parties into Ch.y at their expence, to litigate their claims, & make paym.t according to the decision there given. But if, after the bond is challenged to be voluntary or fraudulent the Ex.r pays it without the interference of a Court he runs the risque of paying it aga

Fitz. 70.

Of Devastavit.

The following acts of an Ex.r have been considered as amounting to a devastavit & will render him liable de bonis propriis, to the amount of the testator's prop. thus wasted. — 1. Where he lays out an unreasonable expence upon the funeral. 2. The paym.t of legacies

2 Vern. 37. 88.

to the prejudice of creditors he having notice of the claims of such creditors, or the paym.t of debts of an inferior rank to the prejudice of those of a superior. 3. The releasing of a debt without having received it is a devastavit. Subjects the Ex.r himself to the am.t of such debt. — So if he compounds a debt i.e. accepts less than is due he is liable for that part not received. It has been holden that paym.t by an

Hob. 59. 66. Co. Ent. 43.

Hob. 10.

ex.r of an usurious cont. of the testator was a devastavit, as he was not legally bound to pay it. But this seems an Ex.r might be excused in this case at least if he paid no more than was conscientiously due: the principal & lawful interest. Paym.t of a debt barred by the Stat. of Limitations is no a devastavit. — It was formerly holden that if

1. Atk. 524.

an Ex.r upon a forfeited bond accepted less than the penalty it was a devast.n. — This cannot be the law

Co. Car. 490.

now, tho' there is no decision in point to the contrary. If the Ex.r takes a bond to himself for a debt due to the testator it is a devast.n or, at least, it renders him liable to creditors to that amount. —

Gels. 10. 2. Lev. 189.

4. Any wasting or destruction of the goods or injury to it by the fraud negligence or mismanagement of the Ex.r is a devast.n — So is the embezzling of it by him, or the selling it a great undervalue. If he sells it for more than it is appraised at he is not entitled to this surplus but must account for it. —

6. Mod. 181.

2. Bac. Ab. 395. Salk. 318. 2 Ray. 1320.

Where there are several Ex.rs & a devast.n is committed by one, the others are not liable for it, & the action must be brot ag.t him alone: — Qu.

If both ex.rs have signed receipts for property of the test.r & one only has in fact received it, both are liable to creditors, but the receiver only, if sued, to legatees.

Salk. 318.

When an ex.on goes ag.t an Ex.r as such, for the debt of the testator it is only ag.t the goods of the testator in his hands; & if he fails to plead the ex.on a scire facias may be brought ag.t himself. Ag.t this sci. fa. he can make no defence which he could have availed himself in the first suit; & if judm.t goes ag.t him upon this ex.on it is de bonis propriis. When he has been guilty of a devast.n it goes in the 1st instance ag.t him de bonis propriis.

A devast.n in C. occasions the forfeiture of the Ex.r or adm.r bond. —

Executors and Administrators.

of the Law of Connecticut.

The first business of an Ex.r or Adm.r is to make an inventory of all the estate which can be apprised in their hands, & to procure an apprisement of it by judicious persons under oath. After this the Ex. &c. must account with the Ct. of Probate for the property inventoried but is not liable, or allowed to pay to the amt. of the apprisement. If the estate is sold for less than the apprised value the Ex. is not liable for the loss, unless it was occasioned by his own negligence &c. in that case he is liable on his bond.

If the estate is solvent, the Ex.r goes on to pay debts & if the personal prop.y is not suff.t to discharge them all, he procures an order from the Ct. of Probate to sell the real estate & with the avails arising from such sale he continues to pay debts until they are discharged.

But the Ex.r may always represent the est. to the Ct. as insolvent if he chooses & it is left to him to do it. There is the least probability of its being the case. Upon this representn. the Ct. appoints Commissioners to examine & adjust the claims agt. the estate. The decision of these Commissrs was formerly considered as absolutely binding, tho it was against the admission of the creditor's claim tho if they admitted a claim the Ex.r might afterwards contest it before a Ct. But it has lately been decided by the Ct. of Errors that on a appeal lies to the Supr. Ct. from the Ct. of Probate if the latter accepts a return of Commrs not made according to law, & this as well in favor of Credrs as an Exr.

These Commrs appear to be empowered to examine into the consideration of a bond note &c. when had enquiry

is necessary. With regard to a bond &c. which is discovered to be a voluntary one, some difficulty may arise; if it is admitted by the Commiss.rs with the other debts it may render the estate insolvent & if it is rejected, the claim is forever debarred, even if the est. should be solvent. Mr. K. thinks it ought to be admitted by the Commiss.rs & the Ex.r afterwards suffered to contest it as trustee for the Creditors; for, he cannot contest it as Ex.r, it being good ag.st the obligor & his representatives, tho' not ag.st his creditors. –

After the Commiss.rs have decided upon all the claims, if those which they have admitted exceed the value of the estate, the Ct. of Probate, to whom a return is made of these proceedings, strikes an average among all the creditors, giving them such a proportion of their debts as the estate will allow. In this average are included creditors of all kinds there being no preference shewn to any class of debts except those for funeral charges, sickness &c. & taxes due to the government. Nor are cont. creditors, even their claims have been liquidated & allowed by the Commiss.rs being considered in as good a situation as creditors by Specialty. This average among all the creditors Mr. K. considers as the prominent feature of this part of our Law; one which ought to be carefully preserved in all decisions on this subject. –

The practice has been to include only debts that are strictly the debts of the testator & the reasons adduced for extending it to the sickness the last, Mr. K.) –

A creditor, who has neglected to exhibit his claim to the commissioners within the time limited for that purpose, can never afterwards recover his debt, unless he discovers some new prop.ty of the deceased not entered in the inventory. In such a case the Sup.r Ct. have rendered judgm.t according to the average paid to the other creditors, but this judgm.t was reversed in the Ct. of Errors. It seems, indeed, that the Sup.r Ct. have no authority to give judg.t for an average sum in these cases, but that the business belongs to Probate. – Mr. K. supposes that the Stat. does not contemplate any merit in the

person making the discovery of the new estate; but that as new property is by any means discovered, it must be inventoried by the Ex.r, that a new average must be made, & that the new creditor, if his claim is allowed by commiss.rs appointed to examine it, is, after receiving the average before paid to other creditors, to take an average share of the remainder. But in this case, a creditor whose claim was presented within the time limited & rejected cannot present his claim again but to share in the new average. If the Ex.r or adm.r refuses to inventory newly discovered prop.y knowing it to be the testator's or intestate he is liable on his bond. But, if the Ex.r has doubts with regard to the ownership of the prop.y it would seem reasonable, that the creditor claiming should indemnify him in making the inventory. – Qu. Might not the cred.r in this case, on the refusal of the Ex.r to inventory, he having settled the whole estate before discovered, take out adm.on de bonis non? –

If in C. a creditor attaches prop.y of the testator before or after judgm.t but dies, it is questioned whether the creditor has such a lien on the prop.y attached as to hold it in preference to other creditors. He would clearly have a preference if the Stat. had not expressly provided that judgm.t debts should not be preferred to others. And notwithstanding this proviso it seems improbable that the Stat. was intended to defeat such a lien; but was designed to refer merely to judgm.t debts, where there was no lien obtained upon any particular articles of property. – A mortgagee in a similar case, is allowed to hold the land mortgaged in exclusion of all other creditors; & if the prop.y thus attached had been levied upon by an ex.on there is no doubt that the lien is good; And, it appears reasonable that it should be in the case first stated. —

If the Ex.r or adm.r does not inventory, or if he makes a false account, or does not account, he forfeits his bond; but the non paym.t of a debt is no forfeiture in Eng. or C.a. Non paym.t of a legacy by an Ex.r in C.a is no forfeiture if he has assented to the legacy. If he has bro.t suff.t & will not assent it is a forfeiture.

In C.a an Ex.r or adm.r can never plead plene administravit ag.t a creditor except in cases in which the effects are merely suff.t for paym.t of funeral charges & the other privilegiad debts; because if there was any thing more an average must have been made among the creditors & the ex.r must have paid this average. If he has done this & has a cred.r he must plead & show all the doings of the C.t of Probate, & it will be a sufficient defence.—

Executors and Administrators.

Of an Ex.r de son tort.

An Ex.r de son tort or in his own wrong, is one who without authority intermeddles with the prop.y of the deceased, so as to render himself liable to creditors. He is liable not on the ground of being the legal representative, but because he has so conducted as to give creditors just cause to presume that he is legal Ex.r

5 Co. 33. Cart. 104. Cro. Eliz. 114. 120

As to what acts will render one an Ex.r de son tort of the intermeddling is such as fairly allows the inference that he claims the managem.t of the estate as Ex.r cannot be reconciled on any other ground he is to be so considered but not otherwise.

This character cannot exist where there is a rightful Ex.r or adm.r acting as such, unless he claims to be the rightful Ex.r or adm.r or unless he has possess.n of prop.y belonging to the dec.d, liable to the debts of creditors yet not liable to the Ex.r or adm.r

5 Co 33-4. Salk. 313.

Ibid. 75.

This happens where the dec.d has in his life time made a fraudulent conveyance of his prop.y to any one or where he has made a voluntary gift which will operate to defeat creditors. In the life time of the grantor his creditors might have sued him & levied on this prop.y but after his death the Ex.r is not liable because he never had nor could have this prop.y in his hands the convey.ce of the test.r being good as to him. The only method therefore for the creditors to satisfy their claims is to sue this grantee as Ex.r in his own wrong with the testator.

Ab. 49.

An Ex.r de son tort is liable to creditors no further than to the amount of assets which he has taken, & after they are exhausted he may plead plene administravit unless he pleads ne unques Ex.r for if he pleads this plea, he is bound as him he is liable for the whole claim at all events because he has told a lie upon record. This is a strange case.

Cro. Eliz.

5. Co. 31.

An Ex.r de son tort when he is named in the writ as rightful ex.r of the last will & testament &c." & this is in the form whether the dec.d died testate or intestate.

1. Lev. 5. Carth. 104.

An Ex.r in his own wrong has none of the privileges of a rightful Ex.r or adm.r. He cannot maintain a Debt for his own debt as executor even of an inferior rank, nor can he maintain any action as Ex.r —

Carth. 104. 5. Co. 30. Cro. Eliz. 530. 1. Lev. 75.

He is liable to the rightful Ex.r or adm.r in an action of trespass for intermeddling with the prop.y & it is no justification that he has paid out all the prop.y that he received to Satisfy debts — This will only go in mitig.n of damages. —

Mr. Pickens thinks that according to the spirit of our Stat. there cannot be an Ex.r de son tort in C. no provision being made for an average distribution in such a character in case of insolvency, & that in the instant part of our Stat. as to the average b.y.t. frauds in such cases would be entirely defeated. This character is however mentioned in one part of the Stat. & the Cts have recognized his existence tho' the question has never been regularly made. — The proper method in C. would be for the rightful Ex.r or adm.r to inventory property in the hands of a wrong taker & to sue him in a higher action for the recovery of such prop.y —

Executors & Administrators.

Of Wills.

No particular words are necessary to make a will. Any thing exhibitive of the testator's intention is sufficient. If that can be gathered from the words made use of it is to be followed in the construction of the will.

Loveday 2. To every will in Eng. there must be an Ex^r. A testamentary instrum^t not admitting an Ex^r is called a testament.

Love^k 140-1. Generally every person not under disability may dispose of all his personal prop^y by will. But a husb^d cannot dispose of his wife's choses in action, chattels real, & paraphernalia. Nor can a person by will dispose of prop^y holden in jointtenancy in Eng. because the jus accrescendi intervenes between the right of the testator & that of the devisee or legatee. But as this is not known in U.S. the reason of heralding ag^t the devisal of prop^y holden in joint tenancy does not exist.

2. Bl. Com. 398. By the ancient Com. law, an estate for life with remainder over could not be created in personal prop. but now the direct reverse of this rule obtains; & a tenant for life of personal prop^y may be compelled in Ch^y to make an inventory of such prop^y if judge it there, & also to give security for the careful use of it.

Pt. of Prem. in C. determined in Grants case, that no est. for life could be created in pers^l prop^y.

3 P. Wms. 334.

1 Br. Ch^y. 280

An est. for life with remainder over may now be created even in a chattel interest, as a lease for years; but the person to whom the remainder is given must be in esse at the testator's death, or within 21 years afterwards.

2. Bl. Com. 1st.

But an estate-tail cannot be created in personal prop^y so that if personal est. is given in Eng. to a man "& the heirs of his body," the absolute ownership vests in the first taker. The reason assigned for this rule is that an est. tail in pers^l prop^y cannot be barred by

1. Br. Ch^y. 279. 2. P.

33. 22^d. 2. Bl. Com. 115

fine or recovery, & therefore, that if he proved to exist, it must be a perpetuity which the law will not suffer. But, as in a Stat. of C. the immediate issue of the first donee in tail take an absolute fee from the in real prop. thus given, the Eng reason for vesting an absolute prop. in the first tenant does not apply here: since, in giving the same effect to the words "heirs of his body" in gifts of personal, as in those of real prop., no perpetuity is created.—

Pre. Ch. 385. If a will contains a clause in it that the testator orders all his just debts to be paid, the Ex. is bound to pay those barred by the Stat. of limitations.

Fid. 33 b. In C. the age at which a person may make a will of pers. prop. is 14. In Eng. it is uncertain.—

Idiots, lunatics, madmen, & persons reduced to reason by old age intoxication or otherwise are incapable of making wills. With respect to the degree of capacity requisite in this case, no definite rule is established, the C. generally relying on the testimony of witnesses to determine whether the test. was in the exercise of his mental faculties or not.

If the test. was unable thro' ignorance or blindness to read the will, it must have been read to him, such reading must be proved.—

Deaf & dumb persons may make a will, if it can be proved that they could in any way make themselves understood by others.

Bl. Com. 500. It ought to be in writing, & written by the testator, but it is not indispensably necessary that they should be signed, tho it is the safer & more prudent way. The test.'s name written by himself in any part of the will is a sufficient signing. There is one instance even by devises

Bl. Com. 500.

Executors and Administrators.

in which the testator's name, the written by another hand, yet being approved by the testator was holden to be sufficient.

It is not necessary that there be subscribing witnesses to a will of pers.l prop.y; and if a will be made containing a disposition of both real & pers.l prop.y it is not essential to as to avoid the former yet the latter will pass by it. This will in almost every instance overthrow the test.r intention, to effectuate this it ought to be read or void in toto.

At com. law nuncupative wills might be made of pers.l prop.y to any amount. But the restrictions imposed upon this kind of wills by stat 29 Car. 2d have almost abolished them. No instance of a nuncupative will has occurred in C. P. as there is no stat. on the subject, it is doubtful how far they might be admitted, or whether they could be admitted at all.

Of Contracts in
1st Of Bailment.

1 Ld Raym. 909. Law on C. 2d ed.

Bailment under the Eng. law is divided into 5 kinds. 1. A delivery of goods for safe keeping without any reward, or naked bailment called in law depositum. 2. Lending gratis or commodatum. 3. Lending for hire or locatio & conductio. 4. Goods delivered as a pawn or pledge. 5. Goods delivered to one, who is to carry them for the owner, or to do some act respecting them for wages. & this whether the bailee is a common carrier or one specially employed for that particular occasion. 5. Goods delivered to be carried gratis. — Mr R. makes a different division of the subject. he includes them under three kinds. 1. The naked bailee, which comprehends the 1st & 5th kind under the Eng. law. 2. The common bailee which comprizes the 2d 3d 4th & some part of the 5th kind, viz. the special carrier or agent of the Eng. law. 3d The bailee at all events, which includes only the other part of the 5th kind viz. common carriers &c. —

Of the property which the bailee (in general) acquires in the thing bailed. —

If property is entrusted by one man to another, a purchaser of the latter will some times hold the property against the bailor, altho' the bailee by the terms of the bailment had no right to sell it. sometimes he will not. The law when this subject is very nice, & altho' the principles appear to be pretty well settled the application of them to different cases, is very difficult —

A governing principle in this branch is this. that if the bailment is of such a kind that from its nature it might reasonably be presumed that it will come to be known to the bailee, — if it was of such a nature that it would probably lead to consequences of that kind — or if it were such as to afford third persons ignorant of the bailment good reason for believing that the bailee were the actual owner of the property a bonâ fide purchaser will be secure; otherwise the bailor may recover the property thus bailed & sold. Thus a horse left by one to a person to whom he has been lent to ride a few miles only may be taken by the original owner in whatever hands he is found. tho if he had

Burr. 4 Vol. 830. Str. 919. 1157. Cowp. 232.

been lent to perform a journey of some hundreds of miles the case would have been different. The jewels sold by one, in whose custody they had been lodged for safe keeping may be reclaimed by the original owner. Cattle, entrusted to one to be driven to a particular place & then driven to another place & sold may also be reclaimed.

3. Atk. 44. 1 Ves. 5.

So if horses, oxen &c. are left by a creditor in the hands of a bankrupt debtor & the debtor sells them, the sale shall bind not only the actual owner, but also his creditors; & there is an additional reason for this; the creditor has put a confidence in the bankrupt & holds him out in public colors in point of credit whereas the purchaser has done nothing of this & therefore, has lost equity to the original owner.

4. Burr. 520. 1 Ves. 290. 1. Atk. 155. 1 Ves. 348. 3rd. 5.

So if a horse is stolen & sold, the original owner may claim it wherever in the hands of the purchaser; tho' he has been sold in market overt: For here there is equal equity between them, neither having been guilty of any negligence &c. and where that is the case the prior title is to prevail. But if the horse were procured of the owner by fraud & then sold, the vendee would be secure: for the owner is chargeable with some degree of negligence & imprudence in suffering his property to be thus taken, & the equity, therefore, is not perfectly equal between them. If therefore there has been any negligence imprudence or improper confidence in either of the parties which will render his claim less equitable than that of the other, (a very little, in many of these cases will be sufficient) that party shall not prevail.

2 Burr. 70.

2. Ves. Jun. 570. Hob. 210.

A other idea to be taken into consideration is this, whether the bailment is not in its nature of public utility & advantageous to a large class of the citizens, & whether it is not in its nature a charitable act and one tending to the general good. If it is, the claim of the original owner will be preferred to that of a subsequent purchaser: [illegible] always be regarded with an eye of tenderness, & encouraged to the utmost limits that policy will allow. Upon this ground, it has been decided in C. that if a cow be sent to a poor man to keep the bailor's title shall not be divested by a sale made by

the bailee; for the act is a neighbourly & laudable one, & of general utility. But if ten cows had been thus bailed the case would be otherwise; for it was by no means necessary or proper that he should be entrusted with so many.

It has been decided by Sir P. W. that, if prob.y lent to a son in law by way of caution for fear he should squander it on his marriage with the lender's daughter, be sold by the son in law, the title of the father in law is not divested. This adjudic.n Mr R. thinks not consonant to the gen.l rules.

As to the right of creditors to prob.y thus bailed, the law seems to be this - That, if any person not knowing the transaction gives credit to the bailee, while such prob.y remains in his possess.n, upon the strength of this prob.y of which he is the apparent owner, the cred.r may undoubtedly seize the prob.y for paym.t of his demand. And the reason is that the bailee in having this prob.y in the hands of the bankrupt has given him an undue credit with the world & by holding him out in false colours has contributed to the deception of those who have trusted him. A prior cred.r knowing the transaction seems has no right to lay on the prob.y in this case. But if so, without knowing it, he lends - Mr R. supposes that it ought in justice to hold it, because he would otherwise be exposed to great expense by the decision arising from the bailm.t - see in

*Vid. 313. Held in Cadogan vs. Kennett, Cowp. 432, that personal prop.y comprized in a marriage settlement bond remaining in the bankr.s possession was not liable to persons who were his creditors at the time the marriage sett.t was made.

Bailment.

1. Of the naked bailee. There is a difference in the law between the naked bailee to keep, & the naked bailee to do something with the Goods bailed. — The latter, altho he is to have no reward for what he does, is liable for an injury that arises from his negligence; i.e. if he does not take ordinary care, he is liable. But the naked bailee who is merely to keep Goods without any reward is liable for no loss except that which arises from the proper negligence; it must be so great indeed as to carry evidence of fraud: so that it cannot with propriety be called negligence. If the bailee keeps the Goods in this case as safely as he does his own, he will never be liable — in a trial of this kind therefore, the character & the bailee for care & prudence would be a proper subject of enquiry.

2. Salk. Ray. 909.

Salk. Ray. 913. 15. Geo. 1. 28. 50. Cro. Jac. 86. 3. Lev. 89. Cro. Eliz. 815.

1. Co. 83. cont. not two vid. Cro. Jac. 65.

Str. 1099. Salk. Ray. 913.

There seems to be no good reason for this distinction between the two cases of the naked bailee, but the books clearly point it.

When one is possess. of Goods but not the right owner of it, bails it to another, the bailee must, according to the terms of the cont. deliver it to the bailor, & not to the true owner. Tho if he knew at the time of the bailm. that it belonged to another, perhaps he would be bound to deliver it to the rightful owner.

Bol. Ab. 607.

It is said that if A. deliver Goods to B. for the use of C. B. is answerable to both. This is true, in case of a gift from A. to C. which B. was entrusted to deliver: for here, A. may reclaim the Goods, & C. may demand it. & B. must deliver it to him who first makes demand. But if the Goods had been sold by A. to C. B. would be answerable to C. only; because the Goods being transferred for a valuable consid. rests in C. on the delivery to B. who is only a midsman or agent to C.

Bol. Ab. 600. Var. 2. Ro. 128.

If the Ex. of a bailee becomes bound as Ex. of Goods which was bailed to his testator by one not owning it, it is said that as the Ex. comes to the Goods of the testator by act of law he must deliver it to the legal owner.

2. Of the Common bailee. This bailee comprehending the cases of lending bro.ts gratis lending it for hire, & that of entrusting a private person to carry it for hire) is answerable for all damages that ensue in consequence of his negligence. Negligence in this case implies a want of ordinary care & evidence of that which is usually taken under similar circumstances. The law does not require the utmost possible care & attention, but only that which is ordinarily made use of for the preservation of the bro.ts.

2. Ray. 915.

The above rule applies to all the different species of the common bailee while they remain within the bounds of the bailm.t. If the bailee exceeds those he is liable for all accidents & injuries that may happen to the bro.ts, not excepting those arising from the act of God or the open enemies of the land. But even in this case he is not a trespasser unless perhaps the bailm.t was originally procured with a design to exceed the bounds of the bailm.t. If the bailee, after having exceeded, should return within the bounds of the bailm.t would he be liable for accidents not arising from negligence &c.?

5. Rep. 14, Cro. Eliz. 777, 7 Jn. Rep. 172.

Of Pawns.

There are legal in the same general rules as other species of common bailm.t but there are some rules peculiar to this species of com. bailm. A pawn is a pledge of personal pro.ty as security for a debt.

The pawnee is liable for no loss or injury that happens to the pawn while he retains it, unless it arose from his negligence. But if he detains the pro.ty after tender of paym.t he is liable at all events for any injury & is also liable in an action of trover, & it is an indictable offence at com. law.

Bro. Jac. 212. 5. Salk. 23. 2. Ray. 917. Co. 83.

Salk. 522. Carth. 177.

Bro. 753.

After tender of paym.t the pawnor is entitled to recover the pawn altho' the lien of the pawnee upon the pro.ty pledged is discharged & he no longer holds it as a pawn yet the debt of the pawnor is not discharged but stands on the same footing as any other debt after tender.

Bailment — Pawns —

The pawn in the hands of the pawnee is not liable to be taken in exon for his debts, or is it forfeitable for a crime committed by him. —

13. Lit. 205.

After the day of payment has elapsed, the pawnor still has an equity of redemption. Tho' there may be an agreement between the parties, that if the pawnor does not redeem in the time fixed, the pawnee may sell the pledge; & this agreement (contrary to the law of mortgages) is good. — If in this case the pawn should sell for more than was due to the pawnee, he would be obliged to pay over the surplus to the pawnor. The must use due diligence in such case, to obtain the most he can for the prop.y. — Qu. May he not sell, if there is no such agreem.t? —

2 Leon.

2 Co. Rep. 79. Co. Jac. 245. Yelv. 178.

If no time is fixed for paym.t it is said the pawnor may redeem at any time during his life, but that his Ex.rs cannot redeem after his death. There seems to be no good reason for this. If a time is fixed his Ex.rs undoubtedly would have a right to redeem at that time, tho' there are dicta opposed even to this. —

Str. 919.

Notwithstanding the pawn, the pawnee may pursue his legal remedies for the recovery of the debt, unless there is an agreem.t to stand by the pledge. —

Qu. 5. Burr. 505.

Co. Jac. 144. 245. Yelv. 178. 1. Bulstr. 29. 31.

A pawnee may assign the pawn, but it is said the pawnor may still tender to the pawnee after the assignment. This he ought not to do, unless by the assignm.t the pawnor has rendered it more inconvenient for him to tender to the assignee, than it was originally to the pawnee. —

2. Burr. 1351. 1 Leon. 207. 3. Atk. 44. Cowp. 325. —

If a tenant for life of State &c. pawn it to his creditor, who has no notice of the rights of the remainder-man, the pawnee has no lien upon it after the death of the ten.t for life. — But the rem.n man may recover in trover for it without paying what the pawnee has advanced upon it. — But in the above case, pawnee was not entrusted with the possession of the prop.y pawned. —

Salk. 522. 2 Ld Ray. 917. Com. Rep. 33.

The bailee has a right to use the prop.ty bailed, if it is prop.ty which is expensive in keeping, as a horse, cow &c. & is liable for no injuries that arise during such use unless they were occasioned by his negligence. - If the prop.ty is of such a nature as not to be injured by use, but yet is of no expense in keeping, as jewels &c. bailee may use it, but it is at his own risque; - he is liable for all accidents. - If it is prop.ty that is the worse for wear, or that is impaired by use, as cloaths, &c. he is not allowed to use it upon any condition. -

Of actions & remedies to which common bailor & bailee are entitled.

Fitz. 198. a. b.

When goods bailed are wrongfully taken from the bailee, he may have an action ag.st the wrongdoer, to recover not only the value of the goods thus taken, but also the special injury he has sustained by being deprived of them. - But after having thus recovered of the wrongdoer, he is himself liable to the bailor for the value of the goods; & it is upon the ground of this liability that he recovers ag.st the wrongdoer for the value of the goods, as well as for his own special damages: for if he was not thus liable to bailor, he would be entitled to recover only his own special damages. -

The bailor may himself sue the wrongdoer for the value of the prop.ty. In doing he discharges the liability of the bailee; but this does not discharge the wrongdoer from his liability to a suit by the bailee for his special damages.

So that the wrongdoer is liable for the value of the prop.ty to the bailor or bailee tho' not to both; & is also liable to the latter for the special injury he has done him. - And if the bailee first brings the action, as he ousts the bailor of his right ag.st the wrongdoer, he subjects himself absolutely to the bailor for the value of the prop.ty. -

A Taylor by the Eng. law, in addition to the action which he may have for his labor in making cloaths may if he pleases in certain cases retain a garment till he is paid for the making. The rule to determine in what cases he may retain is rather uncertain but it seems that as into strangers & others in whose honesty & ability to pay he reposes no confidence he may retain; but not as to his customers or those in whom he repeated has reposed confidence

Bro. Car. 27. Dyer. 223. 1 Bac. Ab. 540

3. Of the Bailee at all events. This class comprehends all bailments to persons in the way of their occupations the bailee always receiving a reward for his trouble. Such are common carriers who receive prop.y to carry & deliver to one person. innkeepers who receive guests & their prop.y & stewards who receive the goods of a prisoner. In bailments of this kind the bailee is liable for all losses arising from accidents whatever except the act of God & the King enemies of the land. And as by letting himself up in the business which he performs he is obliged to take prop.y &c. entrusted to him the law gives him a lien in all cases upon the prop.y &c. till his fees are paid.

Dum. 523. Mac. 174. Bro. Ab. Ca. Ac. 330. 1 Bac. 240. 1 Wils. 281.

2.

Of Common Carriers.

A common carrier is one who lets himself up, or who is held by public authority for the purpose of transporting letters, packages &c.; in contradistinction to one who is particularly employed & in whom a special confidence is placed. So the masters of packet boats, ferry boats stage coaches &c are all considered as common carriers & liable as such; i.e. are liable at all events except the act of God &c. for the prop.y which they undertake to carry. Neglect in this case has no regard to the utmost care & diligence. That makes no part of the defence the common carrier is liable at all events under all circumstances

L. Ray. 918. Salk. 143. Moor. 402. 1 Pol. 2. 1 Wils. 281.

Salk. 282. 3. Mod. 229. 1. Vent. 38.

The owners of stages, packet boats &c. are liable for all losses that happen in consequence of the dishonesty or negligence of the drivers & servants whom they employ. It has however been held that the Postmaster general is not liable either for the negligence or knavery of the deputy postmasters or mail carriers.

Salk. 17. 5. Mod. 91. 5. 1. Ld. Raym. 646. Cowp. 754.

1. Rol. Ab. 2. 2. Vent. 25. 1. Ab. 18. Salk. 282. 2. Mod. 270.

If a prob. is taken from the com. carrier or otherwise taken or lost without any fault in him the bailor's remedy ag. him is by an action on the case founded in Eng. on the custom of the realm in L. a common action of the case lies. But if the com. carrier is himself the wrongdoer & has taken or converted the prob. to his own use.

1. Vent. 238. Stra. 645. Carth. 480. 2. Show. 81. 4. Bur. 2298.

If a com. carrier is misinformed as to the value of the goods he carries & a loss happens - the other authorities are that he is liable only to the amount of what he was told the value was - the later authorities are that he is not liable at all in such case.

The Exors of a com. carrier are liable after his death for losses for which he would have been liable had he lived - in this it differs from Sheriffs; as the latter receive their fees in lieu from the execution of their office; the com. carriers may not retain the prob. for his fees; and may also recover by his private action which the Sheriff cannot do.

96.

Bailment.

of Innkeepers.

2 Lev. 110. 2 Rol. 84. Cro. Jac. 549.

By the Eng. law any person may at pleasure become an innkeeper i.e. he may open a house for the entertainment of travellers. But the house keepers or taverners i.e. retailers of liquors &c. in small quantities must be licensed.

If a taverner keeps a disorderly house he may be indicted & if inns become so numerous as to be a nuisance, he or those who have engaged in the business may be sued for a nuisance.

In S. taverns keepers unite the employments of both alehouse-keepers & innkeepers & must always be licensed.

9. Geo. 5th. Sal. 15. 388. Carth. 150. 1 Rol. 3. 4.

Innkeepers are bound to entertain all persons who demand entertainment unless they have a good & sufficient reason, as, that the house is full, the family sick &c. — If he refuses without good reason he is liable to an action in favour of the person so used (he having first tendered enough to pay for his entertainment) & it is an inexcusable offence at com. law.

1. Rol. 3. Cro. Jac. 159. Latch. 127. 5. Burns. 273.

An innkeeper is obliged to keep any thing for which he receives a profit even without the owner, as a horse. But he is under no obligation to keep without the owner any thing from which he, as an innkeeper, receives no profit, as a trunk &c. But if he actually receives a trunk for which he is paid here by the owner, he is liable for it as a common bailee. And if he receives no benefit he is liable as a naked bailee.

5. Burns. 273. 8. Co. 32. excell. case —

Generally an innkeeper is liable for all losses that happen to the property of the guest while he is at the inn, except such as are occasioned by the act of God or other enemies but the property must be in ipso hospitium. — If the horse of a guest is stolen from the stable, or from a pasture into which he was put without the owner's direction the innkeeper is liable. But if the horse is put to pasture by the owner's direction & stolen, the host is not liable. Yet, if in the last case, the bars, gates, or fence of the pasture were open or down & the horse strayed, the innkeeper is answerable as a common bailee, on the score of negligence —

Latch. 179. Poph. 175. 5 Burns. 276. 1. Rol. 3. 4.

Cro. Eliz. 285. 8 Co. 33. So, if a traveller in an inn is robbed by his servant or companion, the host is not answerable: But, if he is robbed by a person, whom the innkeeper, without his request puts into the same room, the innkeeper is answerable —

8. Co. 33. Moor, 778. 158. qu. 5. Durn. 273. If the innkeeper enquires the value of prob.s entrusted to him & the owner refuses to inform, or if he requests the owner to lock the door of his chamber, & he neglects the innkeeper, it is holden, is still liable. But, if he requests the guest to deliver his prob.y into his (the innk.rs) own respons.y & the guest refuses, there is some doubt whether he would be answerable. —

1. Rol. 3. 388. Cro. Jac. 158. Moor. 8 mon. 8. Co. 32. The innkeeper's liability in these cases extends only to guests, or travellers or persons actually boarding at the price usually charged to travellers. — This appears to be the point that determines the innk.rs liability. If, therefore, a neighbour lodges at an inn — or, if a person leaves goods there this absent several days — or, if a person boards at the common price given by boarders at private houses the innkeeper is not liable at all events. — So, if one being told that the house is full, says he will make a shift among them &c. innk.r is not liable.

1. Rol. 4.

5. Durn. 273. 1. Rol. 3. Cro. Jac. 224. Yelv. 152. If a servant at an inn loses his master's prob.y the liability of the host to the master is the same as if the latter had himself been there. —

An innkeeper is not obliged to furnish entertainm.t to a guest till he is paid — his remedy ag.t the guest, is either

1. Show. 269. 2. Rol. 85. Cro. Car. 271. — by an action for his demand, on the implied cont. or by detaining him or his horse till paid for the keeping. But, as the rule is law, he may not detain the horse for the expenses of the owner & his servan —

Str. 556. Moor. 870. 2. Rol. 85 By the com. law an innkeeper has no right to sell or use a horse left by a guest, or retained tho' the expense of keeping him should exceed his value. By custom of London he may have it appraised & sold. —

Cro. Car. 271. Carth. 150. 2. Rol. 85. If a traveller not having paid for his entertainm.t departs without leave, the host may make hue & cry & retake him — But if the innk.r consents to let him go, he can never afterwards retake him without legal process. —

Bailment. - Innkeepers &c.

Poph. 128.

If A. takes B's horse & sells him at an inn - B cannot take him without paying for his keeping - for the inn keeper knew not that he was stolen -

Yelv. 92. 101. Hob. 120.

If a third person promises an innkeeper, that if he will release a horse that he has retained he (the promisor) will pay for the keeping; this tho' by parole, is not within the Stat. of Frauds for the inn. by releasing him, gives up a lien which he before possessed. -

In an act. ag. an inn. it is necess. to state in the declar. that dell. was an inn. the plf. a guest &c. There may, frequently, be much difficulty for the plf. to prove the value of the prop. he has lost, for it is not probable any one besides himself can know the exact contents of a portmanteau, trunk &c. - Ought not the plf. in this case to testify himself? in analogy to the case of an act. ag. hundred. for a robbery - & that of an act. for escape in which the escaper is a witness &c. -

Of Sheriffs & the subject of Escapes.

When the body of a debtor is taken upon exec. process, the sher. becomes liable of it the creditor bailing it to him & he is answerable for it at all events except the act of God & the open enemies of the land.

No right of action existed at com. law; there is a decision in Powlen, contra in favor of a creditor, for the escape of a debtor taken in exon. But the Stat. 13. Edw. 1. which gave an action of debt for an escape from the Fleet prison, has been construed by the Cts. to extend to all prisons in the kingdom. But the act or the case given by Stat. 1. Rich. 2d. has generally been used in cases of escape.

2 Burn. 132.

3. Bl. Com. 415.

Of escapes there are two kinds: voluntary & negligent.

2. T. Rep. 131. 2 Sw. 111. 114. 4. Co. 84. b. 4. Burr. 789. 2. Str. 873.

1. Voluntary escapes are such as take place by the consent or connivance of the Sheriff or gaoler who is hereby — 2. All other escapes those which happen by the act of God or other enemies excepted are denominated negligent.

1. Co. 52 b. 1. Vent. 239. 4. T. Rep. 175. 3. Bl. Com. 15. 1. Com. 4. Barnes st. 3. 3. 1. Show. 174. 49. 1. Lev. 211. 2. Mod. 35.

In case of a voluntary escape the Sheriff can never retake the prisoner, tho' the cred.r may retake him at any time, nor maintain any action ag.t him. Even if, at the time of the escape, the Sheriff took a bond to indemnify himself ag.t the consequences of the escape, the bond is void. And the Sheriff is bound to pay the debt for which the escaper was imprisoned without any legal method of obtaining recompense. — If in this case, the pers.l action lies to retake the prisoner, the latter may have the habeas ag.t him.

Moor. 59. 3. C. 52.

But in case of a negligent escape the Sh. may retake the prisoner escaping or may have his action ag.t him for the amount of the debt or, if a bond ag.t a negl.t escape has been taken the Sh.ff may sue on it. He may also have an action ag any one for aiding or assisting in the escape.

Yelv. Eliz. 53. 23 Jac.

It is laid down in many of the books that a recaption in order to excuse the Sh.ff upon a neg.t escape must be made upon fresh pursuit & many nice rules are mentioned to determine what is fresh pursuit. The true ground upon which this business stands is this: If the escaper returns within the gaol or is retaken by the Sh.ff before an action is brot ag.st him by the cred.r for the escape the Sh.ff's liability is discharged. But if before the return or recaption of the debtor the cred.r has brot his action ag.t the Sh.ff he shall not be deprived of a recovery: for having attached to himself a right of recovery this shall not be cut off by any subseq.t act of the Sh.ff.

Com. Rep. 554. Str. 873. Cro. Jac. 657. T. Rep. 125. 9.

The Sh.ff however, even after action brot ag.t him by the cred.r may retake the escaper for his own security; for altho' it does not clear him from his liability to the cred.r it puts the debtor in his hands as a pledge for the debt, which from that time becomes his own.

Str. 873. 3. Co. 52. Sid. 330.

2 Burn 120.

An escape by a prisoner having the liberty of the yard is a negligent escape — For, if it were not, a bond of indemnity taken by the Shff upon giving a prisoner the liberty of the yard, would be illegal & void, the consideration of it being that the Shff should suffer a voluntary escape. This has been decided to be a negligt. escape both in Eng. & C. — The Shff is not obliged to grant the liberty of the yard to a prisoner who offers bonds of indemnity & after granting it he may at any time recommit the person liberated. — And indeed it becomes his duty to do it, the person thus liberated, once escaping from the yard, for after such escape, altho' that is a negligent one yet if the Shff suffers him to remain in the yard & he escapes again this second escape is a voluntary one — This bears an analogy to the case in the books where one being in prison made a hole & escaped but being retaken he was put into the same prison, the hole not being stopped up, he escaped a 2d time & this was held to be a voluntary escape.

On the subject of indemnity see Hutt. 53. Cro. Jac. 652. & 157.

But an escape from the yard altho' the prisoner immediately returns, so that the Shff cannot become liable to the creditor, still the bond is forfeited. The condition is broken & the Shff may recover but it would be merely nominal damages. — So, if upon such an escape the creditor should pursue & retake, so that the Shff is discharged still the bond is forfeited & nominal damages must be recovered.

Cro. 512.
1. Vent. 4. 259. Sub.
202. 1. Sid. 330.
1. Show. 174.

Upon any escape either voluntary or negligent, the creditor may pursue & retake his debtor instead of looking to the Shff, & if he does this, even upon a voluntary escape, the Shff is discharged & must receive the prisoner again into custody — However, notwithstanding such recaption by the creditor he may have an action agt. the Shff for the expence he has been put to in retaking the escaper, & other special damage. — So, the cred. may sue any one aiding or assisting in the escape.

In Eng. the cred. in order to retake must have an escape warrant — In C. it is usual for him to take a copy of the exon left with the gaoler.

5. Durn. 25. A person wrongfully escaping from the custody of the law may be retaken on Sunday. An original arrest on Sunday is void.

1 Show. 174. Salk. 271. 2 T. Rep. 177. It has been holden by the Ks. Bs. that if the cred. or creditors his debtor to escape or releases him from prison, he cannot afterwards retake him nor recover his debt. This decision Mr. R. notes to be a fallacy unsupported by principle: for the cred. may at any time take a new security, & release him. Yet will be good. Why he should not be permitted to release him without taking such security, it is difficult to determine. Mr. R. observes that the Cts. were wont to unite these decisions by comparing a voluntary escape on the part of the cred. to a similar one on the part of the sheriff, but they bear no kind of analogy. And it is remarkable that the case in Dyer to which they are referred, cites an authority in the year books, which, other from, subversions the decision is directly opposed to it.

Dyer —

So, a release of one joint debtor from prison, operates as a release to both & the other must of course be liberated. This rule like the former, appears to be destitute of any rational foundation: For the cred. might have recovered the whole debt of one, if he had chosen to do it; & the rights of the debtor not released, are not infringed by the release of the other. The rule as it applies to cases in which a release is given in consequence of payment is reasonable; but when the release is given from motives of humanity, the rule is evidently absurd & unjust.

A sheriff is not liable for an escape on a void judgmt. — as on a erroneous judgmt. In the first case the original process being void, all proceedings under it are absolute nullities but in the latter case the process being merely voidable, stands good until reversed in a legal manner & therefore conclusive upon the sheriff.

In an action for an escape the whole history of process must be stated with legal precision. There is no necessity however to state in the declaration whether it was voluntary or negligent. This may be made to appear in the justification, if it be the fact. So state it in the declaration is awkward & unnecessary. It is as Lord Holt observes —

Bailment — Escapes.

2 Burr. 1195. & Ibid. 211. 217.

as if a man should stop before he comes to the place. — Under a covenant for a voluntary escape the Plaintiff may give in evidence a negligent escape.

Ld. has a lien upon the body of the bro. for his fees, but not for the prisoners board. Pow. recovers the bro. Shff. may recover him for his fees. —

2 Keb. 294. 2 Rol. 80. Cro. Jac. 419. 2 Lev. 144.

Q. Escapes on mesne process. — If a debtor is committed to prison on mesne process, the Shff's liability is the same as in the former cases. But if a debtor taken on mesne process is rescued before he reaches the prison the officer may excuse himself by returning the rescue. If it is taken on exon it will be no excuse for the Shff. that he was rescued. he is as much liable for an escape if the debtor escapes before he comes at prison, as he is afterwards. —

3 Bl. Com. 290. Lib. 108. Ing. v. 2. 2 Burr. 1195. 5 Ed. 3. Barnes 323. 2 Keb. 295.

In C. it is the practice to permit a debtor taken on mesne process to go at large till judgmt., if the officer has been ready to produce the judgmt. such permission is legal: But if he is not in custody at the time of the judgm. given the officer is liable. Qu. If he is surrendered during the life of the exon?

2 Burr. 1195.

In this he must be in custody at the return of the writ

4 Burr. 611.

In an action for an escape before judgmt. in which must be an action on the case, not debt, the damages are always uncertain; And the Shff. is not liable unless Pl. can prove a legal claim against the person escaping. — But when the escape is upon exon. the cred. may bring case or debt. In the latter his recovery will be for the amount of the exon. on which the escaper was committed; but, in the former the damages are presumptive & uncertain. — In R. the as the remedies are concurrent, the recovery ought to be the same in both. —

Cro. Jac. 289. Cro. Eliz. 765. 2 Burr. 1205.

The Ex. of a Shff. after his death, is not liable for an escape.

The law of C. respecting the right & liability of Shffs &c. is, in general, the same as in Eng. There are, however, some alterations made by Stat. & some by adjudications of Cts. By a Stat. of C. the Shff. is excused in case of an escape thro' the insufficiency of the gaol, & the county is made liable, because here the County builds the gaol & not the Sheriff. In Eng. the Shff. is liable in such a case, as he builds the gaol, tho' at the expense of the County. If, however, the party escaping thro' the insufficiency of the gaol is himself of sufficient ability to pay the cred. must according to the adjudications of the Supr. Ct. & Ct of Errors in C. sue him & not the county. Again, if the party escaping is a bankrupt & unable to pay any thing, the Plff. can recover only nominal damages agt. the County: for, say the Cts. the Plff. ought to recover only in proportion to the real injury sustained, & this is but trifling for if the bankrupt had not escaped the cred. could never have got any thing. These adjudications are, at least, very convenient for the County, as they virtually exempt them from all liability except when the person escaping is able to pay at the time of the escape & becomes unable afterwards, in which case they may be obliged to pay the whole debt.

Sixty days after the exon. issues being allowed in C. for making a return, the Shff. may, if he pleases, permit the debtor to go at large during that time: And even if he has once taken him, & permitted him afterwards to go at large he is not liable to any action, provided the debtor is in custody at the exper. of the 30 days. But if, in the last case, the debtor is not in custody at the exper. of the term limited the escape is not voluntary but negligent. This law is applicable only to final process.

Tho' in C. the County is nominally liable for escapes thro' the insufficiency of the gaol, the Shff. is also liable if he has been guilty of actual negligence; as by not ordering repairs when the gaol is broken or decayed in any particular place.

102.a

Bailment — Escapes.

Salk. 272. At com. law, a Shff is punishable for a voluntary escape by forfeiture of his office; and in case of an escape thro' actual negligence he is punishable by fine.

1 Rol. 94. A civil action for an escape is to be brought ag.st the high Sheriff & not ag.st the gaoler or immediate keeper — but if the action is criminal one it must be brot ag.st the immediate keeper only. —

By com. law the person actually keeping the prison was punishable in case of a voluntary escape, in the same manner in which the prisoner if convicted would have been punished — The Shff was also, in such cases, punishable in the same manner if the punishm.t of the crime for which the prisoner was committed did not exceed a fine — But, the punishm.t extended beyond a fine the gaoler only was liable to suffer — In c. a voluntary escape of a criminal is considered only as a high misdemeanor punishable by fine, imprisonm.t &c. —

2. Durnf. 154. Salk. 18.7 Doug. 42. As to all civil purposes the acts of Shffs bailiffs or deputy are the acts of the Shff himself, and the latter is liable as if he were the actual agent —

Of Contracts. —

Of the Consideration to Contracts. — Vol. 1. 252.

Both at law & in equity it is essential to the validity of a contract, that there be a consideration; or that the contract be in such a situation, that no proof can be adduced to shew that there was no consideration. — And a man cannot be compelled, either at law or in equity, to fulfil a contract entered into without consider.ⁿ unless the nature of the contract precludes all enquiry respecting a consideration. —

5. Durn. 143.

The quantum of the consider.ⁿ however, is not regarded: Though if the thing specified as the consider.ⁿ has no value, as a rush, the contract will be void; yet it is not easy to discover how a barley-corn which is a sufficient consider.ⁿ, is more valuable than a rush. Indeed, the goodness of the whole of the doctrine respecting the necessity of a consider.ⁿ may very justly be questioned. The difference between a barley-corn & nothing in a contract of any magnitude, is so very trifling, that it might be considered as almost beneath the dignity of the law to stoop to an enquiry whether there was actually a barley corn given as a consider.ⁿ or not. The Law-merchant has abolished this rule of a consider.ⁿ being necessary to the validity of a contract. But the Com. Law still maintains it. —

2. Pow. on Cont. 152. 144.
5. Durn. 373.
Co. Eliz. 87. 150.
Co. Car. 70.

Relation of Landlord & tenant is suff.ᵗ consider.ⁿ —

Moor. 854. Co. Eliz.
19. 4. 55. 1 Rol.
25. D. Co. Inc. 183.
Pow. on C. 353.
Sid. 45. Co. Car. 435.
Q. Co. 94.

Forbearance of a debt ra. the debt is a good consid.ⁿ on which to found a promise. But the forbearance must be total or for a time certain; or it is held for a reasonable time of the creditor to be judge.

Forbearance to a stranger

Contracts.

Tit. 1st. Ch.
1. Pow. on Cont.
333 - 342.
2. H. 242.
1. Fonbl. 329. 338.
2. Dany. 580.

It is a common opinion that a written contract under hand & seal, acknowledging a consider.ⁿ is valid without an actual consider.ⁿ. But a written contract in itself considered, is no more binding without a consider.ⁿ than a parole contract would be: For, if from the law of the writing it appears that there was no consider.ⁿ it is void; or at most only nominal damages can be recovered upon it. But, if it does not appear from the face of the writing that there was no consider.ⁿ, the contract if reduced to a specialty will be binding as to the parties; parole proof being inadmissible to prove the want of a consider.ⁿ in a specialty; unless the rights of third persons are affected by the contract.

3. Dany. 538.

In regard to bills & covenants not with bonds, it is said nominal damages are recoverable. The consider.ⁿ being examinable — Can want of consid.ⁿ be proved if the covenant expressly acknowledges a consid.ⁿ?

Of persons by law disabled to contract.

Pow. on Cont. 11. &c. Fonbl. 41-3.

Idiots lunatics & persons of unsound memory are not capable of making conts. as they are devoid of reason & incapable of assenting to them.

Co. Litt. 390. 522. 4. Co. Rep. 123.

By the Eng. law however a man is not permitted to plead his insanity as a defence ag.st a cont.t for the rule is that no one shall be permitted in a Ct. of law to stultify himself. The method in Eng. to avoid it is by an adjudic.n in Ch.y by the Attorn.y in behalf of the lunatic which is followed by a decree accordingly to be void.

3. Atk. 170. 3. P. Wms. 105. 111. 2. Vk. 215. 2. Vern. 414.

The conts. of such persons are generally considered as wholly void but merely voidable; & if not set aside in the above manner during the life of the lunatic may be avoided by his heirs after his death.

3. Mod. 295. 301. 2. Ld. Ray. 315.

In C. the maxim that a man shall not be allowed to stultify himself is holdly disregarded & a lunacy pt. is plead like any other defence to a cont.

Bac. Ab. 172.

Insanity is sometimes a ground for relief in Ch.y and a cont. made a bar in that situation.

3. P. Wms. 130 note A.

But this is only in those cases where the person imposed was not into that situation by the art or contrivance of the person who has made the bargain with him; & this cont. must be an unreasonable one or Ch.y will not let it stand.

1. Ves. 10.

Thus if one person another person takes advantage of his situation to make an unfair cont. with him there is no case which warrants the interposition of Ch.y to relieve him yet a Dr. P. thinks that Ch.y might approve relief upon the ground that an undue advantage was taken of his situation.

Contracts.

If however money is taken from a drunken man without any consid.n indeb.t.a.k. lies to recover it back

1. Doubt. 56. 93. 95.
3. P. Wms. 126.

Where an unreasonable cont. is made with a person of a weak mind Ch.y will relieve ag.st it; tho it is said they r. it only in those cases where they can infer fraud; but the very circumstance of a cont. in an unreasonable bargain made under such circumstances is sufficient evidence of fraud. —

Infants are in many case privileged as to their conts See Doc. 34 &c.

Femes covert See Doc. 19 &c.

1 P. Wms. 239. 720. 3. Ib. 310. Cowp. 37. If a party making a cont. is ignorant of his rights & the cont. is made under a misapprehension relative to them, it may sometimes be avoided. But a compromise of a dubious title is binding, notwithstanding ignorance in either of the parties.

It is frequently mentioned as a rule that ignorance of facts but not ignorance of law will invalidate a cont.; but this does not appear to be strictly true, for in the schoolmaster's case there was no ignorance of facts & yet relief was obtained; for one of the parties was ignorant of the rights the law allowed him & in all cases of such ignorance relief ought to be had.

2. Pow. on C. 101. Noy. 304.

So it has been held that if a cont. obtained by duress is confirmed after the duress is removed under ignorance of the law as to its binding force, Ch. will relieve ag. it. And a Ct. of Law has taken cognizance of this principle when they decided that the maker of a note was not liable on his promise to pay it, when he made that promise not knowing that he might refuse payment for want of notice.

2. Pow. on C. 153. 5. Bur.

Ignorance of law appears to be the only ground for setting aside the cont. in these cases but no positive rule appears to be established for determining in what cases ignorance of law shall have this effect.

2. Pow. on C. 253.

Ignorance of fact fraudulently induced is always a reason sufficient for setting aside a cont.

2 Pow. on C. 156.

If a misrepresentation respecting the true state of facts is made this ignorance not from fraud the rule is this: If the misrepresentation was in a point material to the cont. without which it would not have been made Ch. will set the cont. aside: But if it concerned only an immaterial part of the cont. which would have been entered into without it the

2. Pow. on C. 100. 222. 224. 203. 1 Ves. & Bee.

it may have rendered the cont. more pleasing to one party, & induced him more readily to agree to it yet it must stand; & the party injured must take his compensn. in damages in a Ct. of Law.

& cont. the results impossible to be performed is void. & money paid to induce a performce. of it may be recovered back in an actn. of indebitatus. but if the impossibility arose merely from the peculiar circumstances of the party undertaking, an action lies ag. him to recover damages for non performce.

1 Black. Rep. 351.

A bond with a condition which is idle above or impossible is void & the condition only void. But, if in this case the condition is incorporated with the bond the whole is void. — in K. thinks this is lawe unfounded & that the law rule ought to apply to both.

1 Toubl. 124-5. Dyer. 82.

It is a general rule of law that in an exec. cont. if a thing stipulated for is not delivered, its value at the time fixed for delivery is the rule of damages in an action at law for non performance. But in some cases, when it is impossible for the person stipulating to fulfil his engagements — when thro' want of scientific knowledge, he is ignorant of the value of what he promises (as where the purchase

2 Ld Ray. 1104. 6 Mod. 305. 1 Lev. 111.

of a horse agreed to have a barley corn for the first nail in the horses shoes & double it for every one). Cts. of Law have made the value of the article sold the rule of damages. But the propriety of such decisions may justly be doubted. For, by establishing such a rule of damages the Cts evidently make a cont. for the parties which they never intended. And besides as hard or undue advantage is very apparent, it would seem that the cont. ought not to be established at all.

If an impossible precedent condition is annexed
1 Pow. on C. 155. to the grant of an estate the estate never can vest: if such condition is a subsequent one the est. vests absolutely & is not divested by non performance:

1 Pow. on Cont. 445. 10 Mod. 208. 1 Co. Rep. 98 b. Sit. 203. If the performance of a cont. became impossible by the act of God, of the law, or of the obligee, the obligor is discharged; if by the act of the obligor himself, he is not excused.

8 Bn. & Cr. 117. If A. contracts to sell to B. C's farm, which it is impossible for him to do, because C. will not sell it to him, A. still he is liable to B. in an action at law for damages, but C. & A. would never decree the specific ex.n of this cont. But if A. has himself contributed to this impossibility the case is different; as if he had contracted to sell to B. a farm which he A. then owned but which he afterwards sold to C. here in action at law would be for damages or Eq.y would decree a specific ex.n of the cont.

Contracts. Unlawful.

3 Burr. 22-38. A promise, which the party making it has not power to make either in fact or law, is void.

Pow. on C. 164. A Cont. must be morally possible; i.e. lawful. —

1 Fonbl. 213. Conts. may be unlawful & therefore void. 1. as tending to encourage the commission of offences as the laws of God as murder theft & other mala in se. 2. those that are encourage mala prohibita, or offences not naturally criminal but made so by particular Stats. & 3. those conts. which are considered as against sound policy or contra bonos mores. —

1 C. Co. 3. 102. Cro. Eliz. 199. 230. 2 Cro. Car. 33. 353. Co. 6. 39. All engagements to do an unlawful act or to say, or to indemnify another for doing it are void. & one engaging to perform such act tho he has received the pay for doing it, is not obliged to perform it, or if he has performed it he cannot recover the wages of his iniquity. —

Doug. 455. Lowry vs Thurman. Cow. 6. 90. — If one has received money as hire for the performance of an unlawful act the money may be recovered back from him before the unlawful act is committed, tho not afterwards. a very ridiculous rule, because it evidently has a tendency to excite the man who has received the money to be quick & diligent in the performance of the unlawful act, lest the money should be snatched from him before he has received it by performance. —

Hyde on Sales. 155. Bur. 2069. 3 Dr. 418. 7 Ev. 259. a. A security given or a promise made in consequence of a transaction made illegal by positive law, is not of course void. As if one of two partners on a loss sustained by both in an illegal undertak. pays the whole, & takes a security of the other for ye part. If no such security is taken that partner who has paid the money can have no remedy against the other.

2. Wils. 341. The reducing an illegal cont. to the form of a specialty makes no difference in its operation; it is still void: for the turpitude or illegality of the consider.n of any instrum.t may always be enquired into.

Aut. 53. Where the illegality of a cont. was not known to the parties at the time of entering into it it may be binding; it is upon this ground that it has been held
Cro. Jac. 652. that an indemnific.n by a creditor to an officer, for taking prop.y not belonging to the debtor is good.

Hob. 12. 10 Co. 100. A cont. tending to encourage the unlawful omission of duty is illegal & void. And this rule obtains
10. Mod. 159. 4. Durnf. 465. even ag.t foreigners if they collude with & assist natives in violating the laws.
3. Ab. 1.

3. Durn. 693-5. Wagers, if about indifferent matters have been
2. Ab. 510. 1. Lev. considered under the Eng. law as binding conts. tho' it
33. 5. Mod. 374. may be doubted whether they are not ag.t sound policy. But
Cowp. 20. 39. a wager wantonly affecting the feelings of third persons
735. or tending to introduce indecent evidence; or if made use of as a cover to a Bribe &c. is void.

11. Co. Rep. 53. A contract in restraint of the exercise of a man's
Cro. Jac. 595. trade or calling is void as being ag.t sound policy. A
Moor. 115. 242. cont. however by which a man engages not to pursue his
Palm. 172. trade in a particular place is good. But such cont.
Stra. 730. 1. P. Wms. must have a competent consider.n & parole proof will
151. 192. 1. Br. be admitted even if the cont. is in form of a specialty,
Ch. J. 410. to prove whether there was a consider.n or not.

100.c.

Contracts. Unlawful.

10. Co. 100.
Rowd. 58.

If a Gaoler takes a bond from a prisoner that he will remain in Gaol a faithful prisoner till he has paid up all fees &c. & also for his board, this is void for the gaoler has no right to retain him in prison for his board.

7 Ed. 118a. also.
550. 2. Pow. on C. 135.

Marriage-brokage bonds & conts. with heirs for their expectances the good at law are void in Eq.

2. Pow. on C. 1. 150. 145.
Cath. 41. 2. Bur. 812.
Cowb. 790. Sang.
Lang & Bourdieu.

If an unlawful cont. which was not binding has been actually performed, no relief can be had either at law or in equity provided both parties are equally guilty. An infant however does not come within the rule, as he may recover back in indeb. ass. money which he has lost at play, the reason is a particular is criminal. But if one party has been induced by necessity to pay money on an illegal cont. it may be recovered back both parties not being in pari delicto.

2. Bur. 1094.

It is a general rule that when a cont. is entered into in a foreign country Cts. will further it if agreable to the laws of the country where it was made.

2. Durn. 52.

But if the cont. is made to be performed at home, & is contrary to the laws there existing, Cts. will not further it. So, if the cont. be to do a thing malum in se Cts. will not carry it into ex. tho it be agreable the laws of the country where it was made.

1. Fonbl. 220-234.

C. Usury. —

Pow. on Mort. 421.

By the Eng. Stat. of usury, any cont. by which more than 5 per cent. is reserved for the loan of money is absolutely void. And in addition to the 5 of the loan if more than 5 per cent. is received, its treble value is forfeited & may be recovered in an action popular.

Doug. 223. Cro. Eliz. 20. 2. Mod. 307. Bur. 2253. 1. Saund. 295. 3. Wils. 250. 390. 2. Burr. 241. 3. Id. 531. 9. Comy. Dig. 583. Doug. 708. 713.

An illegal receiving subjects to the penalties of the Stat.; an illegal reservation in the cont. renders it void. But an illegal reservation does not incur the penalties; nor does an illegal receiving affect the cont. These rules have been adopted in the construction of the Stat. in C. —

The offence of usury is determined to be complete at the time of receiving too much & not before. This is important to be known on account of the Stat. limiting prosecutions for this offence. —

2. Lev. 39. 3. Id. 205.

If upon a cont. for the loan of £100 £3 are paid at the time as a premium for loaning the money & an obligation given for £100 with legal interest, too much is reserved, & the cont. is void; for the lender in fact loaned but £97 & has taken an oblig.n for £100. But this is not taking too much; tho' if the lender at the end of the year takes the £100 with the lawful int. he has then received too much & is liable to the penalties of the Stat. —

4. of C.

In C. only the single value of the sum lent is forfeited on conviction of an illegal receiving.

III.a.

Contracts. Usury.

1. Fonbl. 22. 235.

Courts of Equity considering usurious conts. aside from the rules of positive law, dealing on principles of strict equity, upon a plic^n to them by the borrower will free him from his oblig^n to pay any thing more than legal interest but considering that he actually had the principal lent, & is in conscience bound to pay the legal int. will compel him to do so.

Stat. of C.

* this is upon a cont. in which too much has been reserved.

In C. by Stat.* the borrower when sued* may, if he does not choose to plead the Stat. & throw the hlf. out of his whole claim, file his bill in Ch. (this must be done on the second day of the sitting of the Ct.) as a plea in bar to the Pl^ffs declaration; & the Ct. sitting as a Ct. of Equity in such case, must exchange all interest & render indem^t for the hlf. to recover his principal only & costs, if they find that the cont. is actually usurious. And for the purpose of making this discovery, the Stat. has enabled them to examine "all parties concerned, as a Ct. of Equity does". This has been construed to extend to the examination of the hlf. only the ag^t. whom the bill is filed; the deft. who files the bill, cannot be examined unless the hlf. requests it. The bill "informs the Ct. as a Ct. of Ch^y" &c. & says the Ct. as a Ct. of Ch^y to interpose & grant relief as by a certain Stat. entitled &c. they may". —

Cts. in E. have thought themselves bound by the words of this Stat. to give judg^t for the hlf. even when the whole principal of the note sued was usury which has accrued on another cont. In such a case, indeed, they wo give only nominal damages, but full legal costs. —

Contracts. Usury. —

A sheriff's note &c. given to secure usurious int. is not only void itself, but also renders void the principal cont. — A parole agreem. to take more than legal int. made at the same time with a bond reserving only legal int. has been held in C. to render the bond usurious & therefore void. Tho' Mr. R. doubts the propriety of the decision, since such a promise is of itself corrupt & void upon the face of it, & ought not therefore to be sufficient enough to destroy the bond. —

Attempts have been made by a great variety of contrivances to avoid this Stat. as, by way of covering a loan of money under a bargain or sale of collateral articles. But it is now settled that if the sale be merely colorable, & the real object of the parties be a loan, any exorbitance of price or an exorbitant sum allowed for forbearance, will render the cont. usurious, as much as if there had been a direct loan in the first instance. Yet if the object be a sale merely, or loan of collateral articles, no excess of price will render the transaction usurious.

2. Durn. 238. 1. Fonbl. 233. Cowp. 112. 3. Durn. 531. 1. Atk. 301. "a very crafty case."

A loan of stock, or of money produced by the sale of stock on an agreem. that the borrower shall release the stock or repay the money, with such int. as the stock would have produced, is not usurious, tho' the int. exceed the usual rate, & tho' the money was to be repaid on the stock not being replaced on a day subsequent to that on which the stock was to be replaced, if at all: unless the agreem. as to the stock be merely colorable & intended to cover an actual loan of money over.

3. Durn. 531.

It has now come to be settled in the Eq. cts. that any attempt to evade the Stat. by ingenuity & artifice &c. will bring a person within it, if there be actually more than legal int. obtained.

Cro. Eliz. 28. 2. Leo. 8. 1. Show. 8. 2. Bur. 704. 1. Fonbl. 232.

Contracts. Usury.

2 Vent. 83. Cro. Jac. 253. 528. 2 Bro. 30. Cro. Car. 501.

To make a cont. usurious it is necessary that it be corrupt, that the illegal interest contained in it should be reserved with design; for if it was inclined thro' any mistake of any kind it is not usurious. And whenever there has been a mistake which gives a cont. the appearance of usury the Ct. in his rectifying to a lean of usury may let forth circumstances to prove that there was no intention to take more than legal interest.

3 Burr. 538.

The word "corrupt" is a technical necessary in a plea of usury & also in the verdict of a jury in which they find it to have existed.

The computing of interest by a mode different from that adopted by the Cts. of law with no intention to evade the Stat. does not constitute usury tho' it may make a greater sum than the legal method.

Kirb.

The method adopted by the national Ct. of Exch. of Eng. is always to apply payments in the first place to the interest that has accrued & if the excess that then applies them to the lessening of the principal, but if they do not amount to as much as the interest, due, still after deducting such payments from the principal & interest, altho' there may remain more actually due than the original principal yet interest must never be cast on any greater sum than that, for if that were allowed it would be giving interest upon interest.

Cro. Car. 283. Sug. 223.

It is now settled that the receiving of interest before the end of the year is not usurious tho' somewhat more than lawful int. is in this way obtained.

4 Burr. 513. 515. Salk. 449.

Compound interest is not considered as usurious: But from principles of policy Cts. will not suffer more than simple int. to be recovered upon a cont. reserving compound int. Yet if compound int. is actually paid, or if a tolerable security is taken making principal of the compound interest which has accrued, Cts. consider the payt. or security as legal.

But when the lender proceeds by the embarrassed

Talb. Ca. 41. Salk. 449.

circumstances of the borrower, takes compound int. as the condition of forbearance, Ch. of Ch. will grant relief. —

If a sum greater than simple but not exceeding compound int. is reserved not as interest but for forbearance, the cont. is usurious. —

5. Rep. 69. Cowp. 112. 2 Ld. 2. 7. 3. Durn. 531. 1. Tonol. 231.

An increase of int. in nature of a penalty for non-paym. of the principal at the time appointed is not considered as usurious: the obligee having it in his power to avoid by punctuality the additional int. (But would not such addit. int. cannot be recov. in indeb. of assump. Coup. 116. Ch. relieve as it as a penalty? — It is on this ground that the credit-price of merchants is not usurious. —

Cro. Eliz. 43. Mar. 3978. 3. Wils. 390. 4. Durn. 355. 5. Co. 69. 2. Bur. 715.

When, according to the terms of the cont. there is an actual, bonâ fide, hazard of the principal lent a reservation of more than legal int. be it ever so much more) is not usurious: As in the cases of bottomry respondentia, annuities for lives &c; but a mere hazard of the interest will not justify the taking of more than legal int. —

Cro. Eliz. 542. 741. Carth. 58. 1. Show. 8. 1. Atk. 304.

The hazard in these cases must be real not colorable; tho' in many cases it may not be easy to distinguish the pretence from the reality. —

On the ground of an actual risque of the principal, the lending of cattle in C. to be returned double at the end of 3 or 4 years is not usurious. tho' in case of accidents falling upon the lender. — But there must be an actual lending & a real risque run or the cont. will be usurious. —

Fro. 156.

Of the Law to be usury. Generally, a cont. is to bear the interest of the country where it is made. but, if it is relating to a transaction or business that has occurred in another country, it may many times carry the int. of the latter. — It is presumed that if a cont. were made in one country, & the security for it executed in another, the int. of the country in which the cont. was made might be reserved in the security 2u. If it was to be performed in the latter country?

3. Atk. 727. 2. Burr. 53. 2. Bur. 1094. Tatt. 38.

If both parties, bound for the purpose of evading the Stat. go into another State, & there execute a cont. for the loan of money; such cont. would it is presumed be governed by the laws of that State, to which the parties belonged, if sued upon there. —

Cro. Eliz. 20. 1. Saund. 204. 2. Rol. 367.

A cont. originally usur., is not affected by a subsequent usurious agreement.

3. Burr. 531.

If one usurious security is made the consider. of another the latter is void. — But in such case it has been held otherwise where the plf. was not privy to the usury; as, where the original obligee of the usurious cont. assigned the security to an innocent third person, in whose hands the obligor renewed it, not disclosing the usury it was held that the usury was purged, & this bar security good. — The Sup. Ct. in C. have decided the same point exp.: — that the 3d person was a legatee of the obligation. —

4. Bur. 2069. 5. T. R. 410.

Cro. Eliz. 175. 20. 1. H. Bl. 452. 2. Bur. 1094.

If two conts. one good & another usurious are united in one security, & the security is afterwards avoided, it has been a question whether the good cont. revives. Upon principle it would seem that it does revive: For such security when avoided, is considered as void to all intents & purposes ab initio; it cannot even be given in evidence. It would seem absurd then to ascribe to such security so much efficacy as to merge & annihilate a cont. which was originally good. -

Doug. 708.

Bills of Exchange & other negotiable instruments which are usurious, are void in the hands of innocent indorsees; otherwise the stat. might be wholly avoided. -

In pleading usury it is necessary to state that there was by corrupt agreem. received more than at the rate of 5 pr. cent, or lawful int. viz. 10 pr. cent. &c. stating how much more, but it is not necessary that the proof should tally with this statement; if any more is proved, it is sufficient.

*Ves. 178. a. 410.

Cts. in C. have leaned of late, in favor of an allowance of interest on liquidated demands, from the time at which they became due. In all cases, I believe, they conform as to this particular, to the established usage of merchants, when ~~such~~ the case comes within such usage. -

2. Burr. 53.

Contracts. –

Pow. on C. –

If cont. for sale of ale or wages is void & money has been paid upon such cont. it may be recovered back as having been paid without consider.n –

Of Fraud in Contracts.

1 Bur. 30 & 4. 480.

Co. Rep. – Thorogood's case.

4 Dorns. 155.

Fraud in the execution of a cont. renders it totally void: non est factum may be head to such cont. – But if the fraud is in the consider.n the cont. is good, at least if induced to writing, the in such case they will relieve against it, in favor of the person imposed upon. –

The reason assigned for this distinction between fraud in the execut.n & fraud in the consider.n is, that in the former case the party imposed upon does not in contemp.t of law, assent to the cont. but that in the latter he does. Qu. Is not assent virtually wanting in both cases?

The real ground of distinction I take to be the That when the fraud is confined to the consider.n it would be impossible in many instances most cases to determine from the terms of the cont. whether fraud has been practised or not: but as to fraud in the ex.n the line is obvious. –

The Sup.r Ct. in C. has in cases in which the fraud in the consider.n was not partial but total, i.e. when the party cheated has received nothing considered the cont. as utterly void. – The Cts. of Law in Eng. however have refused to work this method considering the rule as too firmly fixed to the contrary.

Powers. & Ellis. cited Doug. 24. in notes. – sed vid. 3. J. Ch. 438.

In cases of the last kind, when one has had money, he may in disaffirmance of the cont. recover what he has advanced, in an action for money had & received, or he may compensate himself by an action for damages in affirmance of the cont. But if the bro'd handed with in this case be any other than money, the latter remedy only can be pursued; for the act. for money had & rec. lies only for money itself.

When Eq. relieves ag. a cont. for material fraud in the consid. it is always upon the terms of restoring the parties to the situation in which they stood before making the cont.: if therefore the party imposed upon has received bro'd. of any value he must restore it to the other, before he can have his relief.

Of the Action of Fraud.

3. Burr. 58. 2. Ray. 593. 2. Lw. 118.

This action lies

1. Upon the warranty, when one falsely warrants bro'd. sold, as being his own, or as being good in its kind. 2. On the false affirmation, when the vendor of bro'd affirms that it is his own, or that it possesses qualities which it does not. 3. When the vendor of the b'd. conceals private defects known to himself.

1. In actions on the express warranty, it is not necessary in order to entitle the vendee to damages to shew that the vendor knew the warranty to be false; it is sufficient that it proves so.

1. Rol. Ab. 90. pl. 24. Pyth. 143.

Contracts. - Action of Fraud. -

Cro. Jac. 630. Str. 414.

That an action may be maintained on the warranty, it is necessary that it be made at the time of the sale. - If the if it be made before it may amount to a false affirm.a & an action be maintained upon that. -

2. Sw. 119.

No action will lie upon a warranty, when the vendor warrants qualities which it is apparent to every one the horse does not possess. for there can have been no fraud or deception.

Cro. Jac. 474.

An action lies as soon as the fraud or falsehood of the warranty is discovered. -

2. Any false affirm.a or declaration made by the vendor respecting the horse sold which has induced the sale of it is a found.a for an action. - But this affirm.a must be respecting facts & not a mere matter of opinion; as if the vendor should say that "the horse were worth £100" or that it "would fetch so much" &c. no action would lie, for this was merely his opinion - but if he should say that J.S. had offered him £100 when in fact he had offered but £80 or he might not have at all this would lay an action as it is the false affirm.a of a fact.

1. Str. 445. 1. Lev. 182. Salk. 211. Yelv. 20.

Cro. Jac. 4. 469.

According to the authorities in Cro. Jac. it seems that a false affirm.a of qualities which the article sold does not possess is no ground of an action for damages - but this authority is now over-ruled: tho it is apparent from this, that according to the old rules, a warranty was in all cases necessary. -

3. Durn. 57.

An affirm.a is a warranty in law if so intended. -

3. Durn. 51.

A false affirm.a by a person not interested in the con will lay a found.a for an action against him. -

Contracts. — Action of Fraud.

1. Rol. 90-1.

3. If there is neither an express warranty or an affirm.ⁿ yet if there is a concealment of defects known to the vendor an action lies ag.ᵗ him. — Some intention of deceiving like an express fraud will lay a foundation for an action even tho' the vendor had nothing to deceive the vendee; or, if he conceals any fact which in good faith he ought to have disclosed & which concealm.ᵗ induced the cont.ᵗ an action will lie. — These principles have been fully recognised by our Sup.ᵐ Ct. —

If one sells prop.ᵗ which is of no value at all, on account of some secret defect not known to the vendor he being perfectly honest in making the cont.ᵗ it is dubious whether any action for damages can be maintained by the vendee.. an action of fraud certainly cannot —

If a man is guilty of a real fraud upon another, who afterwards sells the prop.ᵗ upon a third &c. in whose hands the fraud is discovered & the injury sustained, it is a question whether this last person thus injuring the injury can resort in an action immediately to the person first guilty of the fraud. There is no case precisely similar, but Mr. R. thinks that on principle such an action might be supported —

vid. 2. Bl. Reb. 892.
3. Wils. 403.

11th

Contracts. Action of Trover.

2 Lev. 120.
1 Ventr. 373. 109.
3 Mod. 251. 1 Show.
18. Carth. 90.

Whenever one sells Property to another, the ~~law~~ law raises an implied warranty on the part of the vendor that the Property belongs to him; & if it does not, an action lies agt him, on this implied warranty, whether he actually affirmed it was his or not; & this too, whether he was in possession of the Property at the time of sale or not. –

Carth. 90. 1 Show. 58.
10 Mod. 142. 1 Sid.
140. 1 Rol. 91. 131.
1 Roll. 523 Cro. Car.
574. Cro. Jac. 41. Salk.
210. 2 Sir. 123-4.
3 Quinc. 57. 59. Doe
Eq. 633.

When an action is brot on this implied warranty the authorities are contradictory as to the question, whether science must be proved in the vendor – i.e. that he knew that the Property sold was not his own. & those authorities which make science necessary rest upon the ground of fraud & as the U.S. publishers, fraud not to be necessary to ground the action, he thinks science not necessary. –

1 Rol. 91.
2 Wils. 359.

Where a person in the performance of his business does it negligently or improvidently that another receives injury by it he is liable in an action which is sometimes called an action of fraud, but is much more properly an action on the implied cont. which every person makes to do his business well. –

2 Burr. 263. Salk.
91. Salk. 449. 1 Term.
495. 2 Br. Ch. 107.
1 Burr. 310. 3 Ves.
290.
Fitz. 18 b.a.

But it is said will not relieve against a cont. merely for unreasonableness, unless that unreasonableness can be evidence of fraud. But this rule amounts to nothing, for unreasonableness alone, in many cases, outbalances every other consideration will afford conclusive evidence of fraud, & will therefore entitle to relief. It might as well have been said that it affords evidence of science. –

Contracts.

2 Burn. 551. 1. Sal. 150. 1 Vern. 348. 375. 2 Ves. 375. 4 Burn. 115. 2 Pow. on C. 165. 1st ed.

Contracts operating as frauds or impositions on third persons tho' there is no fraud between the immediate parties are totally void, even as to the contracting parties themselves, & are utterly incapable of being ever ratified. Contracts of this kind are those made on a marriage bargain by one of the parties to withhold a part of the portion — or on a composition of debts by a debtor a private agreement to pay one creditor his whole demand &c.

2 Vern. 602.

3 P. Wms. 292. 2 Ves. 159. 2 Pow. on C. 163.

Fraudulent conts. not affecting the interest of third persons may be ratified by a subseq. agreement, or, if the party originally cheated, will when acquainted with his rights, & under no restraint, confirm a disadvantageous cont. it must be charged to his own folly. —

Ved. 100. c.

Marriage-brokage bonds, fraudulent bonds, & cont. in no validity by assignment. nor is the law as to negotiable securities &c. Hyd. v. Cox. —

Ved. 102. c.

1 Term. 11. 2 H. 14. 1 P. Wms. 310.

Conts. with young heirs, or their expectancies are considered in Eq. as intrinsically corrupt. & are now uniformly set aside, tho' it was formerly the practice to enquire into the fairness of the cont. yet, tho' conts. may still be ratified by the heir after he comes into possess. of the estate, it will not be binding, unless, at the time of ratifying the orig. cont. the heir did not act rashly, was ignorant of his rights &c.

3 P. Wms. 292. 4. 2 Ves. 159. 1 P. Wms. 118. 2 Pow. on C. 182. 3 P. Wms. 320. 392.

Contracts.

Of Duress.

All conts. or securities for conts. obtained by duress may be avoided — but, the duress must be pleaded specially to an action on such cont. or security it cannot be given in evidence under non est factum &c. Where a security for a fair & bonâ fide cont. is obtained by duress & thus avoided, the original cont. revives.

5. Co. Rep. 119.

Co. 1st 5.

Duress is of two kinds: 1. Duress of imprisonment. 2. Duress per minas.

1. Bl. Com. 132.

Duress of imprisonm[t] is any illegal restraint of another's liberty, & if a cont. is induced by this means it may be avoided. So, any ill-treatment of a person when in gaol, in order to obtain a cont. & renders it void. But, if one is arrested & imprisoned by due course of law, & gives a bond &c. to procure his discharge, altho' there was no ground of action whatever, yet as the process was in form legal, the bond &c. cannot be avoided on the ground of duress tho' he fully ob[t] might relieve ag[t] it.

Q. Lev. Ab. 319. K.

Q. Lev. Ab. 319.

1 Lev. 18. Q. Ab. 205.

Threats to constitute legal duress, must be a menacing of the life, limb or liberty of the person threatened. A threat to destroy his house, or to commit battery if it do not amount to a maiming or loss of limb do not amount to legal duress; tho' the authorities on this point are somewhat contradictory.

1. Bl. Com. 132-3. 11. Mod. 202. Q. Lev. Ab. 317-19. as to the extent of threats.

It has been considered as a rule that the duress to avoid a cont. must be imposed on the person himself making the cont. i.e. duress on a stranger will not avoid the cont. But, duress imposed on a wife, may be always pleaded in avoidance of a cont. entered into by the husb[d] in consequence of that duress.

2 Ray. 357. Q. Lev. Ab. 31st. 1. Ser. 123.

Ibid.

Contracts. — Duress.

9. Vin. 316-19. 10. Ray. 357. 1. Ed. 28. — In some cases also duress imposed upon a son or other near relation as father or brother but no further, has been adjudged to avoid a cont. But as to this point the authorities are directly contradictory. —

In pleading duress the manner of the imprisonment must be so stated as that it may appear to the Ct. to have been done falsely. —

2. Pow. on C. 189. 1. Ves. 19. 1. Atk. 11. 1. P. Wms. 118. 3. Ib. 294. — Chy will relieve agt. conts. obtained by undue influence, tho' it does not come strictly up to legal duress; because the cont. was not freely & spontaneously made: but, in order to entitle to such relief the cont. must be unreasonable, for, if it is a reasonable cont. they will not interfere. So, if the influence be such only as arose from due reverence & respect as to a parent &c. they will not relieve. —

Conts. obtained under duress may be confirmed 1. P. Wms. 727. 3. Ib. 130 note a 9. Vin. 317-19. after the duress is removed & the party is fully acquainted with his rights. — But such confirm. must be made freely without any undue practices to obtain it, & with no misapprehension of his legal rights by the party making it. —

Contracts.

Of Contracts required to be written.

At com. law no cont. was required to be written; but by a Stat. 29 Car. 2. called the Stat. of Frauds & Perjuries (to which we have no similar in C. as it was not enacted until that has received a construction by the Eng. cts. the authorities upon this point are unhappily ours), it is made necessary that the following conts. be in writing.

1. Any cont. by an ex. or adm. to pay a debt of the testator or intestate in order to be charging upon his own bond. –

2. Any cont. or agreem. by one person to pay the debt or to answer for the default or miscarriage of an other. –

3. Promises in consideration of marriage. –

4. All conts. respecting lands, except in Eng. leases for 3 years. Even these are not excepted in C.

5. All conts. not to be performed within one year from the time of making them. –

But cts. for certain reasons have taken many cases out of the Stat. which fall literally within it – to the rule above are to be taken with some qualifications. –

5 Term R. 348. 256. 1 Ves. 125.

1. As to the 1st rule, it is laid down that if an ex. or adm. has assets sufficient his parole promise will bind him, notwithstanding the Stat. But proof of sufficiency of assets will not raise an implied promise.

5 Term 590.

2. Various cases are taken out of this clause of the Stat. erroneous opinions have been entertained as to the ground upon which it is done. Some have held that a promise to a third person for the debt &c. of a other for which there is a new consider. is binding – Mr Justice once held this opinion but afterwards acknowledged it to be erroneous. If this were to be established as the ground for taking cases out of the Stat. it would reach nearly every case, & the provisions of this part of the Stat. be almost entirely defeated. The idea has been that if there is a promise obligation of the 3d person to the cred. or that it would be lost if the stat. but this is not the case. The law is

5 Mod. 205 Salk. 27 8. That if the cont. or promise of the 3d person be a good Stat. 1685. 915. 1 Wils. – destroy the obligation or settlement of the orig. debtor. 305. 2 St. 94. 3 Bur. 8 – it is agreed the mistake of law of promising the cont. is 188.

A verbal undertak. as surety one writing "made himself answerable for other man's debt" is not a debt in prudence in fact & cannot be admitted under comm. of bankruptcy. Cowp. 1160.

Contracts. Stat. Frauds & Perjuries

Bul. N. P. 3

Str. 1270. Rothery vs. Currie

binding, tho' not written. But, if the new promise comes only in aid of the old oblig.n it is of no force unless reduced to writing. In the former case the promise is called original; in the latter collateral – E.g. If I agree with B. the creditor, that if he (B) will burn the note of C. the debtor – or cancel his account or transfer his debt to himself I A. he will be answerable – If B. accedes to the proposal, A. is bound, tho' the promise is by parole. – But, if A. says "I will pay C's debt if he does not" or "let C. have goods & I will pay you if he is unable" &c. the promise is not binding unless reduced to writing. –

2 Durn. & E. 80. Cowp. 22.

Willes 98

3 Bur. 1880

There are also under this head cases in which parole promises for the debt &c. of another are binding, tho' the original oblig.n be not taken away; but this is where some part of the creditor's property, or some lien which he has obtained upon the debtor is by such promise taken away: as, if the cred.r has attached goods which upon the promise of a third person he releases; this promise is binding, tho' not in writing.

Yet, when a son had stolen goods &c. the father promised verbally to pay the value on the discharge of his son; who was taken, tho' not on legal process the Sup.r Ct. in C. adjudged the father not holden – The lien was, indeed, in this case, not strictly a legal one; but the Ct. was not governed by this circumstance. they appeared not to consider even a legal lien, as capable of giving efficacy to such a promise.

If A. agrees with a sheriff, that if he will discharge B. who is taken on mesne process, he, A. will be answerable for the demand the agreem.t is void unless written: for the Shff. may still retake B. so that his security is not renounced by the agreem.t. Yet, if B. in this case, should escape so that the Shff. could not retake him, A. would be bound by the parole promise.

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3. Lev. 65. cont. 1st case. 5. Mod. 411. Salk. 24. 1. P. Wms. 515.

3. The third rule contemplates not promises to marry but conts. for marriage settlements &c. Parole promises to marry are binding.

4. Notwithstanding the words of the Stat. parole promises respecting lands are sometimes binding — As.

1. Ves. 218. 221. Bac. ab. C. 294.

1. Where lands are purchased at auction, which auction was held under the decree of a Ct. or by judicial authority the bidder by parole is bound. And there seems to be no reason why the rule should not also extend to auctions which are not held under the direction of a Ct.; for the danger of perjury is no greater in these cases than in the former; the notoriety of the transaction being such as to preclude almost the possibility of it.

1. Bl. Rep. 599.

3. Br. Ch. R. 389.

2. A parole promise respecting the purchase of lands will bind the parties if it can be proved by any other than parole evidence. Even that may be adduced when it is not for the purpose of proving the cont. in a direct positive way, but merely by means of circumstances — Thus if A. files his bill agt. B. on an agreem. respecting the purchase of lands &c. & B. in his ans. admits the agreem. it shall bind him, tho' it were made by parole — From this it appears that a parole cont. respecting land is binding if it can be proved consistently with the regulations of law, & without danger of perjury. It has even been determined, in a case like the last that altho' the deft. in his answer denies the agreem. yet if it can be proved by confessions which he has made out of Ct. it shall bind him, tho' by parole. — This last decis. appears to bear hardly upon the Stat.

Eq. ca. ab. 380. 1. P. Wms. 321. 2. Vk. 549. 2. Atk. 19. Talb. 51. 2. Atk. 74. 1. Ves. 221. Bac. Ab. 374. 520. 208. 2. Atk. 100. 3. Atk. 3. Pow. on C. 293. 3. Woodes. 427. Pow. on C. 55. 55. 450. 2. Ves. 370. Vern. 240. 355. 17. 2. Ca. 29. 2. Br. Ch. R. 559. 1. P. Wms. 323.

Pow. on C. 293. 3. Atk. 20. 5. Ves. Ab. 522. 10. Mod. 404.

Talb. 50. 2. Atk. 29. Bac. Ab. 525.

So, a deed bargaining to be an absolute conveyance may be shewn by collateral circumstances from by parole. That Ct. will consider it a mere mortgage — This doctrine has been occasn. by such cases in C. but disrarded by Ct. of Errors. —

Str. 783. 1 Ves. 221. 2 Atk. 100. 2 Vern. 373. 519. 5 Ves. 522-3. Pre. Ch. 519.

3. Parole cont. respecting land, if executed or part by execu-
tee on one part will be enforced in Ch.y. Can an action be
maintained on such a cont. in a Ct. of Law either for non-
performance; or in disaffirmance of the cont. for the demand
first made by the part. who has in part fulfilled?

Pow. on C. 204-5. 428. 1 Vern. 152-9. Pre. Ch. 501-404. 5. 1 Ves. 53. 297. 1. P. Wms. 710. 9. Br. P.C. 45.

The true ground upon which the execution of such a cont.
is decreed is this that wherever one party has derived a ben-
efit to himself, or occasioned an injury to another, by means
of a cont. partly executed, he shall not be at liberty to re-
scind altho' it is by parole; for, if he might rescind after
the other has executed on his part, he would make a fraud-
ulent use of the Stat. & in this way instead of preventing
frauds which is the design of the Stat. it would encourage
them. - And in all cases in which the part. wishing to prevent
a parole agreem.t respecting land, is about to take a greater
dishonest advantage of the Stat. than would necessarily follow
a mere breach of promise, which will perhaps always be the
case when the cont. is partly executed on the other side
Ch.y. will enforce the agreem.t - A man is allowed by the Stat.
to be so far dishonest as to break his promise, but if in addi-
tion to that he is about to derive a benefit from this breach
Ch.y. will not suffer him to do it -

1 Ves. 222. 83. Pre. Ch. 501. cont.

*3. Atk. 2.

Payment of money by one party will be considered such
a part performance as to take the case out of the Stat.
& proof of this payment the parole* is suff.t the same of the
cases seem to follow the contrary -

Actually marrying is not such an execution of an agreem.t
respecting a marriage settlement as will take it out of the
Stat.: for the act of marriage affords no proof of the ex-
istence of any agreem.t. To consider it as such a proof
would defeat the provisions of the Stat. -

Contracts. Stat. Frauds & Perjuries.

5. As to the clause of the Stat. which enacts that parole bargains not to be performed within a year, are void, it has been adjudged, that when from the terms of the cont. it cannot be performed within a year it is within the Stat. But if the parole cont. depends upon a contingency so that it may be performed within a year, tho as the case holds it actually is not yet it is out of the Stat.

3. Bur. 1278. Salk. 280. Comy. 50.

On that part of the Stat. which enacts that the cont. or some note or memorandum thereof must be in writing & signed by the parts to be charged therewith, it has been determined that the name of the parts written in any part of the instrument, with a view of giving it authentick, is a sufficient signing: so that the signing of the bar as a witness has been adjudged sufficient. But mere writing the name without such intention, avails nothing.

1. P. Wms. 7. 2. G. Br. Ca. 5. 1. Ves. 6. 1. Wils. 118. See 1. Ponb. 166. 3. Atk. 503.

Even where there was no signing but one party had signed & the other being present & showing an entire acquiescence it was held that he was bound.

2. Vern. 373.

Proposals respecting a cont. are made by letter & the party to whom they are made shews his acceptance by complying with them on his part. The letter is a suff.t proof of an agreem.t. But if no acceptance has been known — as if letter has never been got till after a part performed, the party to whom the letter was written is not bound, because it was not acted upon by the other. The precise terms of the cont. however must be stated in the letter.

1. Vern. 201. 2. Ib. 322. 1. Pow. on C. 257. 2. Cont. 301. 2. P. Wms. 83. 9. Mod. 3. Bro. Ch. 520. 1. Atk. 518.

Ib. 420.

In pleading the Stat. of Frauds & Perj. it is necess.y to state that the cont. was not in writing &c.

Bro. Ch. 533.

Of Contracts rescinded with the act of the parties.

Pow. on C. 413.

Before a right of recovery has attached in either party the parties may rescind the cont. by merely entering into mutual dissent in the presence of witnesses. And either party of sound mind may bind this abandonment.

Pow. on C. 413. Cro. Car. 334. 2. Mod. 43.

But after a right of recovery has attached the cont. cannot be rescinded by a bare agreem. because the party has acquired a perfect right & cannot relinquish it without a consider.n. There must be a release, acquittance or discharge or some proof of a consider.n to the relinquishm.t.

2. Br. Par Ca. 115. Pow. C. 413. 421.

A waiver of a cont. on one or both sides may be inferred from a long continued neglect to claim the benefit of it.

A right to a penalty in a bond &c. may be waived by acceptance that for which the penalty was a security.

2. P. Wms. 82.

If a wife suffers her husb.d to be used in her husb.d family & neglects to challenge it, she cannot afterwards claim a remuneration for it.

6 Rep. 45. Co. Jac. 5. 7. Co. Eliz. 81. 2. Durn. 104-5. Pow. on C. 215. 223. 423. Esp. 96. 168.

A cont. of a lower nature may be merged in one of a higher nature, but one cont. cannot be merged in another of equal degree. The mere inducing a parole cont to writing, however, does not in all cases merge the original cont. But if a bond or other security which removes the consid.n out of view & enquiry is given, the parole cont is merged & a written cont. expressing the consid.n may be merged in the same manner. And this is the test by which to determine whether the orig.l cont. is merged or not. For if the writing even tho' it be sealed details the consid.n at length it does not merge the orig.l cont, but a fact may be built upon that & the writing given in evid.ce to support it.

2 Durn. 104. 1 Leon. 154. Doug. 93.

An debt which is to accrue in future as an annuity, rent &c be instalments merges by a bond given to secure it. The bond acknowledges a present debt.

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8. Co. 92. Co. Lit. 209. Co. Eliz. 34. Q. Mod. 2.

A person who is to be benefited by a cont. will, however it be wrote, by his act or not of negligence, merely he shall lose the benefit of it.

Conts. may be annulled by a subsequ. cont.

2. Pow. on C. 316. 35. 3. Br. Par. Ca. 389.

If full performce of a cont. be rendered unlawful by a legislative act, part performce if it be practicable, & according to the s. liege will be enforced in Eq.

Of Contracts executed & executory.

Conts. executed are those by which the parties mutually transfer their rights to each other & effect a change of prop. either immediately or on the happening of some event which does not depend on either of the parties.

2. Pow. on C. 235. 2. Bl. Com. 446 &c.

Conts. executory convey no present interest, but the parties mutually trust each other, or one trusts the other. If one agrees to sell the cont. is executory — if he sells, it is executed.

1. Pow. on C. 152. 2. Sh. 255. Co. Lit. 41. Hob. 132. Pla. 2. 432.

A grant executed of a thing of which the grantor has not the actual or potential ownership is void; and if money has been paid in consid. of such grant, it may be recovered back. If the grantor owns what is to produce the thing granted he has the potential ownership of it. The law in this case applies only to executed conts. in executory conts. the grantor is bound to fulfil, or pay damages.

Pow. 432.

But notwithstanding the above rules if a man sells a part of an estate, tho' he does not own it at the time of the grant, yet if he afterwards purchases it, this first sale is binding not only because the vendor is estopped to deny his own deed but also because if the sale were void, the grantee might at the cont. of warranty immediately recover the land in an equitable Ct. Bl. Ed. holds that there is no necessity to resort to Eq. to procure a new conveyce. for the grantor would be forever estopped from denying his deed in a Ct. of Law; but there is no case

In case of a sale in market overt or by an officer under sanction of a legal process, a title passes, altho' the vendor had no

Of the consideration to conts. vid. Sug. 102. 103.

Fl. 103.

The maxim that to every cont there must be a consid. applies in its full extent to executory conts. only. — But if an ex. cont is in writing under seal, the want of consider. does not bar it, the sl. implies it so that only nominal damages can be recov. —

Fl. id. 312. a.

A deed of land delivered is considered as a cont. executed: but a consid. not being necess. to support an executed cont. the fact of the delivery is the only thing essential to the validity of such a deed: whether there was or was not a consid. is an enquiry totally immaterial.

A seal bond for the paym. of money is, if actually delivered, good without a consid. such a bond delivered being in contemplation of law the same as paym. of a sum of money. Therefore a cont. executed is binding even if it appears upon the bond that there was no consid. the deliv. not the consid. being, in this as in all executed conts. the only material enquiry.

A single bill was not formerly considered as a cont. executed, but a mere promise under seal, the consid. of which might be enquired into. It is now, however, on the same footing as a penal bond.

A release is also a cont. executed.

Fl. id. 103.

If a cont. executory is under seal, the consid. need be enquired into except by written documents — a sealed instrum. according to the Eng. law carrying with it so strong evidence of a consider. to be rebutted by parole proof. But if it appears from the face of the instrum. or from written proof, that the ex. cont was made without any consid., nothing more than nominal damages can be recovered on the cont. tho' under seal — e.g. an agreement under seal to execute a release if made without consid. will shew to nominal damages only, the release actually made under seal, is void without consid.

Law on C. 341.
Fonbl. 2. 338.

A will tho' sealed & delivered cannot take effect as a deed, because it does not operate till after the death of the testator. 1 P. Wms. 83.

Dealing in C. gives no additional element to a written instrum. If the cont is written a consid. is presumed. But if without parole proof, it can be shewn that there was no consid. the ct. of Eq. has even in equity that not even nominal damages shall be recovered. —

12a

Contracts.

The time of the in an action against the promisor will be given to a consid.n as in Eng.

The words value received not being never have in a sealed instrum.t in Eng. are not in C. nor yet in a written one.

Pow. on C. 348.
1 Rol. 11.

A consid.n to be sufficient to support a cont. must be an existing one. According to the old notions a promise in consider.n of something past, however beneficial it might have been, was nudum pactum. But now if the act done & for was beneficial to the promisor a subsequ.t promise in consid.n of that act is binding on the principle that the promisor is in honesty bound to pay for the benefical act. And if the act was induced by a previous request or letter it was a beneficial act or not the subsequ.t promise is bound.

Bur.

On a promise founded on a past consid.n deb will never lie; it must be assumpsit. of anything.

2 H. Com. L. 15. Cb. 25.
5 Co. 2. 2 Ld. 3. Com.
5 Co. 2. Co. 137. 2. Rep.
250. Cb. 233.
1 Cb. Ca. Ro. Ab. 27.
Ro. 2. 25. Yelv. 18.
1 Rol. Ab. 25. Com.

It has been been asserted that a promise founded on a prior moral obligation is binding. This he denies. It is in fact is not to in all cases. For if some cons.n constitutes a debt, after her coverture the wife promises to pay for the debt contracted on a prior moral obligation would not bind her. So also if the husband promises to pay the wife of the wife after coverture. qu.

The true rule appears to be this, that if the original consideration out of which the moral obligation arises or on which the subsequ promise is founded was in itself utterly void & had as created no liability nor semblance of liability, the subsequ.t promise will not bind the promisor. But if there was even a colour for it the promise is binding.

Cb. 5. 25. 3. Com.
Comb. Co. Eq.

A voluntary covenant creates no legal obligation but is sufficient to support a subsequ.t promise.

Generally no person but the promisee or his representatives can sustain an action on a promise. But in some cases where promise has been made to one for the benefit of another the latter has been allowed to bring the action; but there are no cases in the Eng. books of this kind except where the promise was by parole & not a sealed one. It has been decided in C. that where a bond or note was given by A. to B. for the use of that C. might bring the action in his own name altho it was a written promise. And it is followed that the promise the

1 Lev. 2. 318. 332.
1 Rol. 31. 30. Moor.
30. Cro. 87. 919.
652.
Esp.

upon which such an action might be laid, it would extend as well to any other person as to a relation: for it must be upon the idea, that as the promisee in all cases of this kind is compellable in Chy. to pay the money over to the cestui que use when recovered from the promisor in an action at law the policy of the law which is to avoid the multiplicity of suits would require that the person intended to be benefitted by the promise should bring the action in the first instance.

Hardr. 321 Fitz. 91

It is an acknowledged principle that if money is borrowed by A. of B. to pay to C. & B. neglects or refuses to pay it over A. or C. may bring the action. If this principle holds good a man has availed himself in attempting to prove that notes were negotiable at com. law. It seems to be best the law that an action may be maintained immediately by the cestui que use, without the intervention of the promisee.

Dyer. Rep. 128.

When the terms of a cont. are mutually accepted & has A. will take £20 for my horse & B. says I will give you £20 either part may close the bargain by tendering his part. But if in this case, no tender is made, nor cont. accepted, the parties remain both at liberty to refuse performance. But if a day of perform. is fixed the terms changed & neither party is afterwards at liberty to retract.

2 Pow. on C. 4.

Contracts.

Pow. on C. 381. 1. Toubl. 380. 3. 5 Dum. 269. 1. Vent. 177. 214. 117. 6. Dum. 571. 588. 7. 3. R. 100.

A promise made in consider.^n of an act to be done is not binding till the act is done, or, for lack till the promise has offered to do it, has been prevented by the promisee. But in a bill on the promise performance, or, at least an offer of performance must be averred. But when on promise is in consid.^n of another promise, performance need not be averred by either party. [Ed. Eng. Cts. have been of late very construing promises independent. — How is it in Equity, when the agreem.^ts are thus independ.^t?

Co. Lit. 880. 4. Bac. A. 1. Toubl. 381. 4. Dum. 177. 31. 1. Toubl. 383.

In case of conditional promises as if A. agrees to make a deed to B. on the 10th of Nov. B. having £100. A. agrees to pay £100 to A. on the same day A. making such deed the act is inchoate only but either party may on the day, tender, tho not afterwards close it by performing his part. If neither party performs his part at the day the cont. is at an end. And if on promises of this kind a bill is brought by either party performance must be averred qu.

1. Vent. 177. 214. Salk. 112. 12. Mod. 503. 6. T. Rep. 571.

4. T. Rep. 761. 9. Doug. 588. 344. 3d Ed. qu. 1. Toubl. 381 2.

Of the Action of Assumpsit.

This is an action brot for the recovery of damages occasioned by the breach of any contract or promise. —

Promises are of two kinds, 1. express. 2. implied. Upon an express promise lies an action of express asst. On an implied promise an action of indebitatus assumpsit. —

When a cont. is detailed at length, whether it be by parole, in writing & not sealed, or written and sealed; the action for breach may be brought upon the promise & not upon the instrument containing it; that may be used as evidence of the promise. And if in contracts of this kind a debt is created by the agreem.t a special ass. indeb. ass. & the action of debt are concurrent remedies, and the plff may have either at his election.

Upon a breach of a cont. for the performance, some collateral act, as, to build an house &c. neither debt nor indeb. ass. but a special ass. lies, for recovery of damages; the dam. uncertain. But if the damages for non performance are ascertained by the parties in the cont; indeb. ass. also lies. In the latter case the plff. the promisee may, at his election, bring indeb. ass. or debt for the penalty agreed on, or a special ass. for damages to be assessed by a jury; provided it appears that the penalty was in nature of a security for performance, to make the promise stronger. But if it appears that the promisor was to have it in his election to perform the promise or pay the penalty, the promisee, in case of non-performce, can sue for the penalty only. —

Tho. 1.r C. 124.

2 Ray. 735. 2 T.R. 314. 2 Bull. N.P. 145. Str. 711. 1 Lump. 447.

A special ass. grounded on a promise referring the plaintiff to the promise stated will not lie without the occ.n of the consider.n of the promise must appear in evidence to be the same as stated in the decl.n —

Cro. Eliz. 79. Cro. Car. 144.

Assumpsit.

Indebitatus ass. lies in some cases in which a Special ass. does not: as, for the price of goods sold on a quantum valebat, where no express agreement was made; also for services done on a quant. meruit, no price having been fixed on by the parties. And it is not necessary for the plff to declare for the precise sum due. So for money loaned or for money expended for that which it was the duty of the deft to do. indeb. ass. lies. In these cases, debt also lies. Qu. does debt lie in the last of those cases in Eng.d? So, a breach of trust by which one has been deprived of a sum of money, is a ground for this action.

2 T.R. 29. Forbes. 37. Ibid. 142.

Ibid. 178. a. 5 Burr. 663. 3 Br. Ch. 255.

Notwithstanding the general position that indeb. ass. lies in those cases only, in which debt will lie, there are some cases, in which indeb. ass. is the only action, excluding both debt & special ass: as for money paid by mistake this is the only action. but if the money be paid by mistake under a rule of Ct. it cannot be recovered back in any action. So where money has been obtained by fraud or deceit indeb. ass. lies, in disaffirmance of the cont. In this case, an action of fraud is in one sense concurrent, but an action of fraud is in affirmance of the cont.

Ely. 1. 2. Lev. 134, 150, 167.

2 Bur. 1010. 1 Dum. 285. 112. Lack. 28. 2 Ld. Ray. 648.

If a horse or other property is taken by a wrongdoer, the owner may bring trover for the horse, or if he has been sold indeb. ass. for the price, i.e. the price actually received, or perhaps agreed for, not as the case may be, the actual value. but if the property has not been sold or bartered with, the action of indeb. ass. for the price, will not lie. Qu. Will it lie, if the property was stolen? Bul. N.P. 131. 3 T.R.

Bull. N.P. 131. 6 Dum. 667. 2 Dum. 144. 4 Dum. 687.

Indeb. ass. is in its nature an equitable action.

2 Bur. 1012. 1 T. Rep. 285. it is therefore, a general description of the cases in which it lies, to say, that it may be brot where the deft is obliged by ties of natural justice & equity to refund money that he has received of the plf. or to pay it, if the plf. has a legal right to demand the same. — When the same concludes, any equitable defence agt it, is good, as it shews that the deft is not bound in conscience to pay the plfs demand.

3 Bur. 1354. 2 Durn. 370.

2 Bur. 1012. 5. 2 Bl. Rep. 1073. 4 Bl. 65. 3 Ilo. 147. 4 Durn. 485. 2 Str. 916. Doug. 671. 696 n. 2 Ld. Rep. 763.

This lies to recover back money obtained of the plf. by imposition, fraud, oppression, extortion &c. — If a person has been defrauded of property, he may not only recover it out of the hands of the person who defrauded him, but also from a third person, if that third person came by the property mala fide, tho' he was not privy to the circumstance of its being obtained from the right owner by fraud. — So, where a greater sum of money was demanded for a bawn than it was hedged for, & paid, indeb. ass. was sustained for that surplus. —

Cowp. 197.

2 Str. 915. 16.

This action lies to recover back money paid on an illegal consider.n, if the parties were not participes criminis; as in case of usury &c. And it seems that the Ct will not consider them as participes criminis in any case where the cont. was not entered into with perfect freedom, voluntarily & without compulsion by reason of embarrassed circumstances &c. indeed it must be such a case that the maxim "volenti non fit injuria" will reasonably apply. —

Ss Vid. 109. 2 Bl. Rep. 1073. Doug. 41. 4 Durn. 561. Alb. Ca. 38. 1 P. Wms. 41. & Vid. 186. a. Tothill. 218. 235.

Money paid on a consider.n which happens to fail, may be recovered back in this action. — So, where the vendor has no title to the property he has sold, indeb. ass. may be brt for the consider.n or an action on the implied warranty. So, if money has been paid, upon a cont. written or unwritten for an act to be done, & the act is not done, indeb. ass. lies for the money paid, in disaffirmance of the cont. or an act.n for the damages, in affirmance of it. —

2 Bur. 1012. 1 Durn. 732. Pai'n. 36 R. 5 Durn. 710. Stra. 406. 1 Tothill. 363. & Vid. 117.

Assumpsit.

1 Salk. 27
1 Burr. 62.
2 Bur. 1005. q.
Bull. N.P. 131.

For money paid under a void authority, & in some cases for money obtained by judg.t of C.t indeb. ass. lies. — But in the last case, the action lies, not on the ground, that the judg.t was inequitous, but by reason of some circumstance attending the judg.t or some subsequent event rendering it inequitable for the def.t to retain the money, as if the judg.t be reversed or, as, if insurance be made upon a Vessel which is supposed to be lost, & act.n is brot ag.t the insurers & a recovery had — if, the Vessel afterwards arrives safe, an action of indeb. ass. will lie by the insurer to recover back the money he paid under the former Judg.t — Where money has been paid upon a forged

+ Ib. 172. a.
1 Burr. 62.
3 Burr. 127.

instrument it has been held to be no discharge ag.t the real creditor, for the authority is clearly void —

+ Ib. 10 H. 133 a.
Cow. on C. 219.
222. cont.a

It is laid down as a general rule, that the pl. cannot sue in one kind of action, when he has a remedy of a higher nature — This rule holds good, only when the object of the suit is the same; if it is different, the plf. may resort to the lower remedy —

Cowp. 414.
Id. 819.
Doug. 18.

The act.n of ass. will not lie, where the question, whether the money claimed belongs to the Pff or def.t cannot be fairly tried in this form of action —

5 Bur. 2509.
2 Bl. Rep. 684.

That species of indeb. ass. called the action for money had & received, which is the most general kind of indeb. ass. it is said lies for money only — It will not lie to recover stock in any of the public funds, & it is said will not lie, even for bank-notes, L.d Mansfield expressing himself that the def. ought to have brought trover for them. Sed qu. —

Efs. 99.
+ + Ib. 101. 253.

If money has been actually received to the plfs use, an action for money had & received, stated generally is good in C. as well as in Eng. — But in other cases in which indeb. ass. lies, if there is no express ass. C.t in C. requires the plf. to state in his declar.n the manner in which the def.t became indebted, in order that he may be prepared to make his defence ag.t that particular claim of the

plf. If there has been an express promise, I suppose the plf must also state the manner of that in his decl.

Cro Car. 340. Cro. Eliz. 240. 6 Durnf. 189. Ibid. 134. bis.

A mere acknowledgment of the existence of a debt, if it be accompanied with a refusal to pay, lays no foundation for an action of assp.

Cowp. 563. 6. Str. 480. 1 Salk. 27. 2 Ld. Ray. 1210. 4 Bur. 1984. 4 Durnf. 553. 2 Bl. Reps. 824. 6 Durnf.

If money is paid by mistake into the hands of an agent or attorney, indeb. asp. lies agt. him to recover it back, provided the action is brot before he pays it over into the hands of his principal; or if notice has been given him, not to pay it over, even after such payment over:- but, if he has paid it over, without notice, the general principle prevails, that the principal alone, & not the agent, is liable.

3 Durnf. 763.

Ibid. 142.

There seems to be distinction in the books, between a general or known agent, and a special or particular one; the former being held to be liable personally, in no case; the latter, in all cases, where he exceeds the special powers given him.

2 Lev. 252. Carth. 92. 1 Durnf. 678. 2 Wils. 95.

Indeb. asp. lies to recover the penalty for a breach of the bye-laws of a corporation &c. for a tax legally imposed upon any members of a corpor.n &c.

So, it lies to recover money due for tolls &c.

Of the action of Book-Debt.—

2 Sw. 166. The action of book-debt is in C, a substitute in some cases, for the action of asst.—

In the action of book-debt, all parties interested are allowed to be witnesses, even a wife is allowed to testify for or agt. her husband.— The parties are not however permitted to testify to all facts; nor indeed to any except the truth of charges on book, & as to the quantity, quality, & delivery, of the articles charged, or, also, to the price agreed to be given.

2 Sw. 170. 1. contra.

Any special agreemt made between the parties, or any collateral fact, having no immediate connexion with the delivery or price of the articles charged, as a postponement of the time of payment, must be proved by common law evidence.—

In this action the judgt may be different from that in an action of asst.— for, if, upon trial, a balance is found in favor of the deft.— judgt must be rendered in his favor, for the amount of such balance.— If the Deft. appears & does not exhibit his demand, he cannot afterwards maintain his action of book debt agt. the plff. unless he assigns some good reason for omitting to exhibit his claim at the first trial. If he does not appear, he may bring his action of book debt afterwards, & altho' he will recover his acc he will not be allowed his cost unless he gives some good reason for not appearing before—

2 Sw. 171.—

Ved. 233. a.

The mode of trial may also be different; for, the Ct. is empowered to appoint auditors to examine the accounts of the parties, & strike the balance — This mode is frequently adopted, when the accounts are lengthy. —

The action of book debt seems to have been extended much beyond the original design of the legislature. It now lies in all cases, where an indeb. ass. upon a quantum valebat, or quantum meruit will lie at com. law. — A loan of money may in some cases be charged upon book — the rule which determines the legality of charges of this kind as established by the Supr. Ct. is this, viz, considering the situation & circumstances of the parties, the sum charged on book

appears to be such an one, as might in the common course of business have probably been loaned & no security taken for it the charge shall be allowed: otherwise it will be rejected. —

If A. owes B. on bond or note, & makes payments which the obligee does not endorse, & in consequence of such neglect, A. is obliged to pay the whole contents of the bond &c. he may still sue B. in an action of book debt for the paym.ts made & not endorsed. This rule is, in substance the same as to permit a debtor to swear directly to paym.ts made on a bond &c. & in effect it is worse, for it occasions two suits instead of one. —

When, in cases of book debt, there has been a settlement made & signed by the parties, the Cts will not suffer an enquiry into the items, unless some mistake in comput.n is
2. Sw. 172. suggested; and in that case the parties themselves cannot testify. —

Where articles have been lent, lost or destroyed by the borrower, the Cts have suffered them to be charged upon book: but in no case, except when charged with other articles. —

This action does not lie for any bet: nor in any of those cases in which indeb. ass. lies, where all possibility of a cont. between the parties is precluded, as in case of money paid by mistake &c.

If a party in this action has a book containing the original entries it must be produced. — If he has no such book, his charges made from memory are allowed. —

In an action of ass. on a quant. val. or quant. mer. the same rules of evidence obtain in C. as in action of book-debt i.e. the parties themselves may be witnesses. —

Dunf. 189. ss Ved. 134. A running acct. is not affected by the stat. of limit.ns

132.b.

Of Pleas to Assumpsit.

Of the Pleas to an Action of Assumpsit

Ind. 1. Of Defences accrual with the contract.

It is a general rule in Eng. That in an action of Ass. any thing which goes to defeat the right of recovery in the Pltf., may be given in evidence under the general issue. tho' it is the uniform practise to plead many of them specially. — In C. law it is ruled every thing may be given in evidence under the gen. issue except it be some act of the Deft himself, which defeats his right of recovery as a release &c. —

Vid. 324.

1. Insanity may be pleaded or given in evidence under the general issue.

Vid. 173. a.

2. Coverture. 3. Infancy. In an action lies a covenant running with the land agt. the heir of the Deft. Infancy is no plea in bar.

Edwards. 77.

4. Impossibility of performance appearing on the face of the Declar. is a good defence when demurred. But if the impossibility does not thus appear, it must be specially pleaded. — 5. That the Cont. is void and nugatory — 6. That the cont. is illegal are good pleas to this action — 7. Duress may be pleaded in bar, or given in evidence under the general issue —

Vid. 107. 119 bis.

8. The want of a consider. or that the consider. is past may be given in evidence under the gen. issue unless the ~~instrument~~ contract declared upon is an executed contract & in the form of a specialty as a bond &c. But if the want of consid. appears on the face of the dec. the contract is an executory one, a Demurrer will lie

Vid. 120.
s. 102. 103.
342. 80.

Fid. 204.

2. Of matters arising subsequent to the Cont.

I. By a Stat. of Jac. I. called "The Stat. of Limitations" it is enacted, that no simple contract shall be binding in law after six years standing. —

2 Sw. 215. — Fid. 204.

The Stat. of Limit.ns in C. limits actions of Aff. to 3 years & actions of Book-debt to 6 years — In the latter case it may be taken advantage of under the gen. issue, in the former it cannot. The rule as to Aff. is the same in Eng.d —

2 Bar. 46. 61. 83. Salk. 278. Carth. 387.

It is a question much litigated in C. whether a contract upon which the Stat. of Limit.ns has run, can be so revived by a subsequent promise of performance, as to be a foundation for an action — or, whether the suit should be brot on the new promise. The decisions on this question have been various; but according to the later adjudications the action may be brot on the original contract — Mr. R. conceives, that the subsequent promise, in cases of this kind, operates merely as a waiver of the advantage which the Def.t might take of the Stat., &c. that — the Pl.ff is at liberty to ground his action on the new promise if he chuses — Quere, whether the Pl.ff can have his election to bring his action on which of the cont.s he pleases, as in both cases the object of the sui is the same. There is no new consid.n for the subsequent promise? — Mr. R. thinks it may —

Sec. 12. Doug. 122. 2 Cont. 151. Webster vs. Banister in Dane. — Carth. 471. Dean vs Crane. in 2d Ray. 5 Mod. 425. Sal. 24. 2 Bar. 1149. Ple. in Ch. 385. 1 Leo. 110. 1 Cont. 191. Cro. Car. 100. 114. 381. 404. 0. Dump. 189. 2 Ve. & Be. 5. 104. Dump. 548. 5. Bar. 2828.

It is said amounts to a waiver &c. Doug. 122. 2 Cont. 151. Ray. 425. Mod. 310. 2 Show. 127. 2d ed. 1101. 2 Vent. 14.

A contract is revived by the act of one of several joint-revo. of the act be such that it may be construed the act of all, or at least whether the contract be revived or not the Def.t may avail himself of it as a ag.st

Sec. 120. 4 Dump. 519.

a payment of part of the debt &c. But a mere promise by one is not such an act as will entitle the Pff. to recover ag.st both.

Cro. Ed. 175.

The Eng. Stat. of Lim.ns works to operate on simple contracts from the time at which the right of recovery accrues: viz. from the making of the contract. —

Co. Lt. 273.

Contracts, the performance of which depends on contingencies, are not within the Stat. — If indeed, the Stat. of C. which begins to run on parole contr. from the time of making, extended to these, it would, in its operation totally defeat a considerable proportion of them.

There is a proviso in the Stat. in favor of some contr. of all persons beyond Sea &c. But Mr. Ch. Just. says that the rights of the persons thus excepted, would not be affected by the Stat. if there were no proviso. —

(vid. 134.)

4 Durnf. 300. 7 Ibid. 295. But notwithstanding the proviso, if the Stat. has once begun to run upon a contract, it cannot afterwards be taken out of the Stat. in favor of the persons excepted in the proviso. —

4 Durnf. 519. If one of several joint-creditors, is within the realm the Stat. attaches, tho' the others are absent. —

7 Ibid. 413. There is some contradiction in the authorities, as to the question, whether the Stat. affects an indeb. ass. or not. — The rule, however, appears to be thus: If the indeb. ass. is founded on a cont. the Stat. extends to it, otherwise, it does not. —

7 Ibid. 130. c. If the indeb. ass. be for a penalty, imposed by the bye-laws of a corporat^n, it is not affected by the Stat.

2 Vent. 345. The Stat. does not operate, where the cont. is an implied trust. The same principles pervade our law. —

ss Ibid. 130. c. Cowp. 548. 1 Durnf. 193. 2 Bl. 172. Feb. L. E. 126. 7. A promise, or acknowledgement within 6 years, takes a case out of the Eng. Stat. of Lim^ns. But an acknowledgement accompanied with a refusal to pay, does not. Yet, if there was an offer to pay a part of the debt, a recovery may be had, pro tanto. —

Esp. 154.

Cd. Reg. 189. This Stat. does not affect a running acc^t when the demands are mutual, & credits &c. have been given, within the time limited. —

ss Ibid. 130. c. 132. a.

In E. all title to lands may be lost by the rightful owner thro an acquiescence of 15 years, in an adverse possession. — By our Stat. the right of entry & the right of property are lost together. And he who has the latter, has the former also. This Stat. does not extend to wild uncultivated lands. —

A title to lands cannot be acquired by any length of quiet possession, if such possession was founded on a mistake of the parties in making partition. —

1 Durnf. 188.

Of Pleas to Assumpsit - Accord & Satisfact.

II. A second defence arising from matters subsequent to the Assumpsit, is Accord & Satisfaction. —

An Accord & Satisfaction, is where the obligee to a contract, agrees to receive of the obligor, & actually does receive something variant from the original contract in satisfaction thereof. - Or, something may be agreed upon & received in satisfaction of a Wrong. —

Cro. Eliz. 44. Cro. Jac. 100. 254. 99.

It is a defence that may be pleaded in bar of all actions on simple cont. & of all personal actions for damages. —

Co. 37.

Cro. Jac. 630. 97. 1 Bac. on Cont. 426.

*Accord & Satisfaction cannot be plead in bar of an action on a bond when the right of recovery grows out of the bond itself, independently of any collateral matter, for the same reason that Payment in Eng. cannot be plead to a bond, because these defences are not of as high a nature as the bond & "Solvatur eo ligamine quo ligatur". - It is however a good evidence against an action bot to recover damages for non-performance of the condition - & according to this rule, it would seem to be a good evidence to all bonds other than single bonds or those without condition -

But it is law, that the Deft. may plead accord & Satisfaction of the money due, on a bond, tho' not to the bond itself

Cro. Eliz. 231.

If the Accord & Satisfaction is made before a right of recovery has attached that is before the penalty of the bond has become forfeited, it is a good plea to an action grawing out of the bond itself. -

Cro. Eliz. 40. 193.

Mod. supposes that in C. accord & satisfaction is as good a plea to an action on a bond, as to any thing else, for accord & satisf. is merely a substitute for payment and

and payment without a release, may be plead in C. in bar of a recovery on a bond or other specialty –

9 Co. Rep. 79. If a bond in Eng. be given for the performance of collateral acts, accord & satis. is no defence to an action upon the cont. –

4 Rep. 1. Cro. Eliz. 54. A title to land cannot be affected by an accord & satisfaction –

Requisites of a good Accord & Satisfaction –

1 Str. 420. 2 Sw. 6. cont^n. 1. The satisfaction must appear to be full & complete or, at least, the contrary must not appear. Therefore, payment of a less sum of the same species of property in satisfaction of a greater, is no accord & satisfaction which can bar an action, unless the time, place or other circumstance is altered in favor of the creditor. – The reason assigned is, that without such alteration there is no consider^n for the creditor relinquishing that part of the debt, which remains unpaid –

Any compensation of which the value is not self-evidently less than the sum due, may be a full & complete satisfact^n of a demand, if given & received as a satis^n. But when the thing due & that which is given in satisfaction for it, are the same in species, a difference in the value, if any, will always be intuitively evident – as if a man agrees to receive £5 in satisfact^n of £10. the difference is immediately apparent – But where they are different in species, disparity in value is not required – and the agreement should be to accept a hunt or wine in satis^n for £10 –

Co. Lit. 212

The good sense of the above rules & indeed of almost all the Law upon accord & satisf^n may very justly be questioned – If a creditor is willing to receive & actually does receive £5 in sa-

C. Plas to Ass. Accord & Satisfaction

satisfaction of £10. or a pint of wine in satisfaction of a gallon they may not Cts hold these to be good as well as where the pint of wine is rec^d as a satisf^n for the £10. especially when there may in many cases be potent reasons for determining such a satisf^n good.

1 Wils. 80. 2. The satisf^n must be valuable. It must be a legal satisf^n; such a consid^n as is deemed in law valuable.

Thol. 16. 128. 4 Mod. 88. 2 Salk. Therefore, an Equity of redemption, or any other merely equitable interest asst is of no value in contemplat^n of law, cannot be the consid^n of an accord & sat^n of a legal claim.

It is not probable that our Cts would adopt this rule.

Co. Lit. 212. 9 Rep. 77. Cts will never make enquiry into the value of the articles given in satisfaction.

Yelv. 25. 3. The satisf^n must be certain. For if it is left so uncertain by the parties that it would not make a binding contract it is not good even after acceptance, & therefore an accord to labor "3 or 4 days" is bad for uncertainty. It is however questionable, ~~whether~~ in such case, if it is actually received whether it is not good for the acceptance shows what the parties intended.

T. Ray. 450. 12 Ld Ray. 122. Thol. 129. 1 Str. 420. 571. 9 Rep. 77. 5 Burrow. 142. Cro. Eliz. 193. 2 Burrow. 27. 4. The satisf^n accorded & agreed upon must be actually received, in order to make it a good bar. Tender of the thing agreed on as a satisf^n will not bar an action. Great inconveniences may arise from this rule when the accord is executory, for the obligor may have put himself to great expense & trouble to make the satisf^n according to the accord & then it may not be received. He would however undoubtedly be entitled to an action for such expense.

But the rule is now settled in C. as well as in Eng.

1 Str. 571. T. Ray. 450. When the accord is so framed as to be in nature of mutual promises, it has been held binding without acceptance.

An accord to give or perform any thing at a future day is no bar to an act^n before the day: for at the day the creditor might, if he should choose, refuse the satisfaction.

In a plea of accord &c. it is necessary to state that the satisf^n stipulated was given & rec^d. for this is the gist of the defence.

No. 309. — III. An Award of Arbitrators, is a good defence against an action of Assumpsit.

When Eng. principles, a title to lands can never pass by an award of arbitrators even if a deed is delivered as an escrow to arbitrators, to be given up to the prevailing party, no title will vest by their delivery; since livery of seisin is indispensably necessary to convey land; and this cannot be given by Arbitrators.—

But arbitrators in Eng.d may award the conveyance of lands; and if the person agt. whom the Award is made does not convey; his arbitration bond is forfeited.

2 Dw. 11. In C. a deed put into the hands of arbitrators, as an escrow, to be delivered to one or the other party, according to the Award, may convey a title to lands: For the title here vests, not from the delivery of the deed; nor from the ceremony of livery; but from the recording of the deed, & to whom it is delivered, may have it recorded immediately. Therefore as the perfecting act (viz. the record) in C. depends on the person in whose favor the award is made; the same objections do not arise to the idea of an Award's creating a title, as do in Eng. where the perfecting act, (viz. the delivery of the deed) depends upon the person agt. whom the Award is made.

2 Ray. 248. Carth. 188. 1 Salk. 69. — If the old right of recovery belonging to one of the parties, is superseded by the Award, & a new one given, it is generally the case, that no action can afterwards be sued on the original claim. Yet, in cases of this kind, the old cause of action, is not in every instance, so completely extinguished, as to be incapable of being revived; For when a new duty is created by an award if no obligations have

1 Salk. 76. 1 Rol. 2, 22.

*Vid. 138. 150. have been given to abide by it, & that the parties have nothing in which to rely, except the Award itself; resort may be had to the orig. cause of action — unless the award be

Rol 20. performed or a performance tendered at the day appointed.

But if the award itself creates no right of recovery

2 Lev. 19. as if it enjoin the making a conveyance, release, &c. resort may be had to the orig. cause of action, even before the day fixed for performance. —

*Vid. 138. 153. 130. *However, if Bonds are given to abide the Award, no Str. 492 B. cons

Syll 192. resort can ever be had to the orig. cause of action. — Vid.

+Vid. 135. 138. 1 v. 2. +With regard to Bonds, submitted to arbitrament the same rules are adopted, as have already been mentioned under the head of accord. According to Em. hence

1 Bac. Ab. 25. his no cont. can be admitted to vacate payment of a Bond unless the evidence be of as high a nature as the Bond itself, and the maxim, Solutio eo tegamine quo ligatur, applies to all cases where the debt grows due or arises from the deed or instrument itself — Accordingly an Award could be nugatory. —

2 Lev. 19. The foregoing principles respecting bonds are not adopted in C.

+Vid. 140. Arbitrators have all the judicial powers of a Court of Law & of a Ct of Chancery; & in some particulars more than both;- They give damages or award a specific performance of contracts.- A Ct. of Chancy does not, except in very special cases decree the specific restitution of personal chattels: Yet it is not uncommon for arbitrators to award such a restitution: And the award vests the property of the chattels so completely, that trover may be brot agt the person refusing to restore them.- This, however applies to those cases where no Bond is given to abide the Award: for where that is the case, the remedy for non performance is on the Bond.-

Arbitrators have also the powers of a Ct. of Chy in procuring evidence except that they cannot compel the production of papers.- Their authority may extend further than that of any Ct. for if it be agreable to the Submitts. they may admit the parties, and all other interested persons.

Criminal & matrimonial causes can not be settled by arbitrators:- neither can they settle a title to land, or a dispute growing out of a bond alone.- But if there are a number of controversies submitted among which is a Bond or specialty & an Award is made respecting them all, the Award is good, & the Bond held on it.

+Vid. 142.- 143.a.

1 Rol. Ab. 237.

1. Of the Submission.-

The principles of the civil Law have been gradually interwoven with the old common law respecting Arbitrament & that this title of the law has undergone an almost total change. Hence, the antient & modern authorities are extremely contradictory on the whole legal of Awards.-

138. b.

Of Pleas to Arbitrement & Awards.

Tyd. 7. 90.
12 Ray. 248.

A submission to arbitrement may be

1. By parole; in which case, an action of debt may be brought on the Award, or an action of Arbitrement on the promise contained in the submission - provided the award is for a sum of money but if the award is not for a sum of money, an action lies on the promise, to recover damages for non performance. When a submission to arbitrament is by parole, the submission may be with or without a promise to abide: And if there is a promise to abide, it may be with or without a consideration. In all these cases, if a sum of money was awarded; debt always lay to recover it.

Tyd. 7. 90.
12 Ray. 248.

But if the award enjoined a collateral act, as the delivery over of a horse &c. there was anciently, no remedy to enforce it - & the award was of no use to the prevailing party - even if it was in writing & no consideration expressed, it could not be enforced #

Tid. 139.
6. Mod. 35.

Afterwards it was established; that if there was a promise with a consideration to abide; the award respecting a collateral act might be enforced, but that if there was no consideration for the promise the award could not be enforced

2 Ray. 95.
1039.
1 Sal. 76.
Tyd. 8. 90.
2 Ld. Ray. 122.
6. Mod. 222.

At a later period the rule was, that if there was a promise to abide, tho' without consideration, the award as to a collateral act might be enforced; otherwise, if there was only a submission & no promise to abide. But now, if there is a mere submission tho' there be no promise to abide, the award may be enforced.

Of Pleas to Assumpsit — Awards.

* Vide 137. b. 133. 134. —

2. Bonds may be given at the time of the Submission to abide the Award, in which case, an action lies on the bond for non performance* but it is to be remarked, that a tender of performance by the obligor of the bond, altho' refused by the obligee, completely exonerates the obligor from all liability. —

* or on the Arbitrt. March. 111. —

When bonds are given, the Submission itself, may be either written or by parole. —

3. The Submission may be by a written covenant, in which case an action may be had upon the covenant, & if a sum certain is awarded an action of Debt lies to recover it. — In this written agreet, it is not necessary that there should be an express promise to abide, neither is it necessary that it should be expressed to be for any consideration, tho' formerly if a consideration was not expressed, & collateral act was awarded to be done, no recovery could be had, but this is not law now.

* Ibid. 135. b.

4. The Parties may make their Submission a rule of Court. — but this can be done only where a Suit has been instituted & the cause is before the Ct. The method of enforcing a performance of such an Award in this is for the Court to issue an Attacht & commit the party refusing to performance or an action may be had on the Award. In, C., and Stat., if the Award be for money the Ct. may issue execution for the sum awarded & that Ct. dictates necessarily as a judgment of law. If the Award be of collateral articles it is lodged on the files of the Ct. as a standing evidence of the rights of the parties.

Ibid. 137. b.

1 Salk. 695. —

Query (Ld. C.) whether an action would not lie on the implied agt. contained in this kind of Submission?

139. b.

Ct. Pleas to Assumpt. Awards.

It was formerly a practice in Ct. for the parties to give notes of hand, to confess Judgt., to take out ex.n. to deliver the ex.n into the hands of the arbitrators, which ex.n were to be given up to the prevailing party. this method was adopted to prevent all future dispute; but as corrupt practices among the arbitrators, destroy the avowed stay the foundation for an Judicia Querela, it was impossible to under their decision final in all events. And our Cts. have now declared this practice utterly void, as being intended to prevent, in cases of corruption, that redress which the law provides.

Kyd. 8. Comb. 100.

Bonds are sometimes given to an Arbitrator in his own name — They may also be given by third persons —

2 Br. Ch. 330. Kyd. 98. Vid. 145.

Where merchants upon entering into partnership made an agreement, that if any differences arose between them they would not go before a Ct. of Law but refer it to Arbitrament, the Chancellor, upon petition granted an Injunction to the Ct. of Law to prevent their proceeding in a suit that had been brot forward contrary to this agreement.

Q. Mod. 59.

A Testator cannot obligate a Legatee to submit his claims to arbitrament — Nor can a third person in any case, lay another under such restriction. —

The Submission contains the directions to the Arbitrators & is the commission which gives them authority — They must therefore confine themselves to it or the Award is void — It contains the mode, the time & the kind of Award that is to be made. & a time must always be specified within which the Award is to be made. The Parties may restrain the Arbitrs within what limits they please, as according to Law; according to law & equity &c. but when the submission is general & unqualified the Arbitrators have

Vid. 138. the extensive powers before mentioned.

If the submission be of all controversies, the Award is good if the Arbitrs decide all that are brot before them altho there may be others that are kept back —

141. a.

Of Pleas to Assumpsit — Awards.

Of the revocation of a Submission.

8 Rep. 82. — A Submission to arbitrem. is revocable by either party at any time before the Award is pronounced — Quere, if the party revoking knows what the Award is? A suit at Law cannot be withdrawn after judg. is known.

8 Rep. 82. — If the Submission is by parole, the revocation may be by parole also — If the Submiss. is in writing, it is said; the revocation must also be written —

The party revoking forfeits his bond if any is given — Quere, Shall the whole penalty, or reasonable damages only be recovered in this case? — In C. the practice has been to give liberal damages in one instance the Supr. Ct. chancered down the bond & gave actual (not legal) costs; allowing the Obligee all his expences & an allowance for his time; proportioned to the lucrativeness of his business. —

8 Reb. 82. — It seems that by the Eng. Law, the whole penalty of the bond is forfeited by revocation —

Ibid. — Lyd. 18. — 1 Lid. 281. — ++ Vid. 400. — Lid. — In case of a parole Submission, & parole revocation, there being no bond given, nothing could be recover according to the old authorities, for lay this ex nuda submissione non oritur actio, — But the unreasonableness of this rule has caused its own destruction, & in some late cas it has been determined, that an action on the case will lie to recover damages, for the breach of promise —

If the Submission is by Covenant, altho there is no bond, there is no doubt but an action lies upon it, afte revocation — & surely the reason of the case, ought to extend to parole Submiss. which are covenants not reduce to writing. —

Of Pleas to Assumpsit — Awards.

Hyd. 19. — Where the Submission is by rule of Court, & there is a revocation, it is a contempt, & punishable as such. It is

ss Vid. 399. — a question whether there is any other remedy. —

Keb. — A Revocation may be revoked, provided it is done within a reasonable time — there is here a locus penitentiae. The revocat.n of the Submission does not so far take away the authority of the arbitrators, but that it may be restored to them again without any new Submission, if the revocat.n is revoked within a reasonable time. —

2. Of Persons capable of submitting to arbitrament.

+ Vid. 104. — + Those persons who cannot contract, cannot submit to arbitrament; as lunatics, infants, femes covert &c. —

Where a person submits for an Infant, the Infant is

Latch. 207. — not bound to perform. but if the person submitting gives

Comb. 318. — a bond that the Inf.t shall perform, & the Inf.t does not

3. Lev. 17. — perform, the bond is forfeited — tho' the ancient authorities are the other way. —

Hyd. 23. — The Submission by the Executor, of the disputes of

Comb. 318. — his Testator, was formerly void — It is now good. — But if the

1 Burr. 691. — ex.r obtains by the award, a less, or loses a greater sum, than he would have obtained in the former or lost in the latter case, at law, he shall be answerable for the deficiency in one instance & for the surplus in the other. —

Of Pleas to Assumpsit — Awards

Kyd. 23. Ath. 91. — An Eng. Stat. enables the assignees of a bankrupt, with the consent of a majority of the creditors, present at a meeting duly warned, to submit to arbitrament.

2 Mod. 228. — The submission of one partner in trade does not bind the other, tho' if he does not abide the Award, the bond is forfeited.

Kyd. 25. Dyer 21 D. &c. — If a number of persons agree to submit, & impower A. & B. to conduct the business, the submission of these two binds all.

Kyd. 25. 108. — If in a Submission, one is bound for another, the principal must, as in other cases answer for the act of his agent.

Ibid. 130. c. 12 Ray. 240. Mils. 28. 58. Kyd. 25. 20. 108. 109. — With regard to an Attorney, the rule is this. — he may submit by rule of Ct. & the Client is in all cases bound; but if he submits in bais, without special authority, he is himself bound, & his client is not. If he has special authority, the Client is bound, & he is not.

Formerly all actions in which the party was allowed to wage his law, died with the party himself. But an ex. or adm. is now liable to debt on an Award, made upon a parole submission by the testator or intestate.

Ibid. 137. b. 6 Rep. 43. — The a bond in Eng. is not arbitrable yet a bond to abide by an Award to be made respecting a bond, is forfeited by non-compliance. Even if the submission of a bond, to arbitram. be by parole, yet an action on the case lies for non compliance.

Cro. Jac. 79. 2d Ray. 115. — When a right of action, arises from some injury, or default subsequent, coupled with the bond, the controversy may be settled by arbitrament.

Where there is a joint Submiss^n on one part, altho' they give separate bonds to abide; yet, if the award is joint as that they pay the other party a sum of money &c. each is bound for the whole sum - but if the Award is separate as that one shall do one thing, & the other another, they are not liable for each other, but only each one liable for his own non-performance -

Cro. Car. 434.

The State of a man cannot be submitted to arbitram^n as whether he be legitimate or illegitimate &c.

Ibid. 138. a.

2. Who may be Arbitrators. -

All persons, except those, who want their reason, as idiots & lunatics, those who want discretion, as infants, those who are under the coercion, or control of another person, as femes covert, slaves (formerly villeins also), & those who have in committed some notorious crime are high-roads disclosed in integrity, as persons ~~attainted~~ of treason or felony, may be arbitrators -

mere as to inf^ts & mes cov^t 2 Sw. 13. Bac. Ab. 137. -

Friendship or relation sight is no objection - Persons interested in the controversy, or even a party himself may arbitrate if appointed -

4 Mod. 225. -

An Umpire is a person appointed to make an Award, if the arbitrators cannot make one, or neglect to act. - A single Arbitrator is called an umpire

1 Mod. 275. 2 Vern. 180. -

Formerly, if the power given to arbitrators & the Umpire was so expressed as to import a jurisdiction subsisting in both at the same time, as if the submiss^n was, "that the Award should be made by A & B, by 1st day of May & if they did not make it by that time then they should make it by 1st 8th day of May" then the whole proceedings were void, whatever the apparent intention of the parties might be - for said they the arbitrators have to the 1st day of May to make their Award, & as long as they

1 Mod. 275. - T. Ray. 187. 285. 2 Saund. 129. Lev. 174. 285. - 1st Ray. 571. -

Of Pleas to Assumpt. Awards.

have authority, the Umpire has not an, as the Umpire's authority expires at the same time he can make no award. Or, if the appointment of the Umpire was afore the Arbitrators, & the appointment was made a moment before their authority expired, the consequence was the same, they could have concurrent authority therefore the whole was void.

Cro. Car. 263. 2 Ray. 671. Ld. Ray. 428. 451.

But now if the arbitrators are vested with the power of choosing the umpire, they may make their choice, at any time during the term fixed for their award, and they may after such choice proceed to make an award themselves if they can & if they proceed the Award is good notwithstanding their having been an Umpire chosen. So, the Arbitrators may at any time put an end to their power by declaring themselves unable to make an award & after such declaration an Award by the Umpire is good, as the one within the time originally prescribed for the Arbitrators.

T. Jones. 108. Ld. Ray. 71. 2 Burrow. 845. 2 Mod. 84. Wyx. 53. 56. 3 Keb. 387.

The nomination of an Umpire by the Arbitrators must be effectual; therefore if they ~~appoint~~ name one & he refuses, they may appoint another. (old decis^ns^ are the other way)

2 Lev. 113. 12 Ray. 222. Lyd. 58. 1 Sal. 70.

The Arbitrators cannot decide a part of the controversy & permit the Umpire to decide the rest.

Lyd. 87. Barnes. 317.

An Award made in Eng. by the majority of the Arbitrators is not good, unless the parties specially agree that a majority may make the Award, for they are consid^d^ as having a joint authority. And even if the parties empower a majority to make an Award; still if all are not present, a majority cannot act, unless those who are not present, wilfully absent themselves.

Lyd. 67. + Ced. 400. Barnes. 57.

In C. a majority are to govern without any express provision of the parties; provided that all the Arb^rs^ are present or have an opportunity of being present.

2 Lev. 9.

The Award respecting all the matters referred to arbitration must be pronounced at once.

Cro. Car. 315. Lyd. 77.

Prem. 110. 146. Lyd. 75. Rol. Ab. 135. 2 Mod 139. Rol. Rep. 214. Ro. Dec. 315. Rol. 218. Hardr. 43.

Arbitrators cannot reserve to themselves authority to do any future act, or rather to make any future decision, after the Award is pronounced. It was formerly a question what effect such a reserve of authority could have; but it is now settled, That if the subject matter of the reservation is within the submission; the award is void: But if it is not within the submission, the reservation is void, & the award good.

Lyd. 81. 83. 84. Atk. 515. 519. 501. Mod. 195. Salk. 75. Sw. 550. 2. Bliz. 715.

The ordering of an act merely ministerial, to be done, by the Arbitrators themselves, or by any other person, after the Award is pronounced; does not vitiate the Award. It must therefore be the reservation of some judicial act that is bad.

Lyd. 88. 101. Com. Rep. 330. Str. 1025.

It is also a rule nearly connected with the last that Arbs. cannot delegate their authority. but the meaning of this also is, their judicial authority, for the committing of any thing merely ministerial to other persons is not such a delegation of their authority as is bad. as the ordering costs to be taxed, land to be measured &c.

2 Burr. 1025. 3 Ve. 139. Ro. Dec. 577 10 Mod. 261.

If the Arbs. award that one party shall pay costs, without defining the nature of the costs; they will be understood to have intended legal, not equitable costs.

2. Atk. 501. 515.

So if they determine the substance please only the form to another it is good as if they award a conveyance of land by such deed as Counsel shall advise.

Where Arbitrators in C. awarded that one party should "pay costs", without fixing any sum, or authorising any one to tax them, the Sup. Ct. held, that the award was good & that the costs might be taxed by any Ct.

2 Term Rep. 244.

Arbs. may award costs without any express authority in the Submission.

If one of the parties, after having been notified, will not appear, the Arbs. may proceed ex parte & make the best award they can—

Of Pleas to Assumpsit. — Awards.

Latch. 14.

The Arbitrators may make their Award & pronounce it on the day of the Submission — So, they may pronounce it on the last day at any time before midnight.

Cro. Eliz. 670.

3. Of the Award.

The Award must be conformable to the Submission. There has been much dispute in determining what is without & what within the Submission. It was formerly holden that if A & B should submit "all facts", or "all actions", causes of action could not be included. So, "complaints", were holden to include personal things only. But now whatever may be the general words of the Submission, if the parties by agreement bring before the arbitrators, & in fact submit to them, any controversies &c: an award upholding them is good.

2 Roo. 304. Hyd. q. 3. — Fitz. 114. a.

If a controversy affecting lands be submitted to arbitrament, the arbitrators may award money, or any thing else in satisfaction: tho' formerly in such a case, an award not immediately affecting the lands, was void. —

So, in case of personal disputes, it is now settled, that any collateral thing may be awarded in satisfaction; formerly, nothing except money, could be awarded in such case.

Cro. Mod. 221. — 12 Ray. 1039. —

Query, whether the award of a collateral thing not mentioned in the submission would be good? —

An award that one party should give a bond to secure the sum awarded, has been adjudged good, tho' the arbitrs were empowered to award satisfaction, merely. —

Hyd. 90. — A direction that the parties should stand their suits to the Award has been held good.

++ Ord. 140. — Hyd. 98. — 3 C. Rep. 475. — If partners in trade refer all matters in dispute to arbitrament, the arbitrators have, of course, power to dissolve the Partnership. Their authority to dissolve the connexion of master & apprentice is the same.

The words in the submission "all matters in dispute in the cause between the parties", comprize only the disputes arising out of the cause specified: The words "all matters in dispute between the parties in the cause", comprize all disputes whatever, between the parties. — Care is, therefore, necessary, in wording a submission.

10. Mod. 101. 201. — An Award that one party shall defray the expense of measuring land, is good; it being, in fact, part of the cost.

An Award ordering the payment of a bond given at a time subsequent to that of the submission, is good: it being virtually, the same as an order that any collateral thing should be delivered, or paid.

Formerly, an award directing a release of all demands to the time of the award, was adjudged void, on account of the possibility that some demand might have arisen, between the time of the submission & that of the Award. And an Award ordering "releases" to be given generally without referring to what time, was construed by the Cts as intending to the time of the Award & was therefore holden to be void. Tho' an Award ordering in specific terms a release to be given to the time of submission, was good. — Afterwards, the idea was adopted that an award ordering releases up to the time of the award, was good, unless it was actually shewn that there were controversies that had arisen between the submission & the Award. But now, a release

10. Rep. 132. — Hyd. 155. — 2 Mod. 159. — 3 Lev. 188. 314. — 1 Show. 292.

3 Mod. 204.
12 Ray. 115. 903.
10 Mod. 201.
12 Mod. 590.
Lyd. 114. 150.
162. 162. 181.

to the time of the Submission, is a good performance of such an Award. And if in obedience to an award of the kind a release of all demands, to the time of the Award should actually be given, full the release would operate on those controversies, only, which subsisted at the time of the submission. (Lucas)

5 Rep. 77.
10 Rep. 131.
12 Ray. 123.
3 Lion & 52
Cro Car. 541.

An Award directing any thing to be done by or to a Stranger to the Award, was formerly void in all cases. But the rule afterwards established was, that if the act awarded to be done to a Stranger is beneficial to the party in whose favor the Award is made, then the award is good. as where the dispute referred to arbitrament was between A & B, such of them should lay a Bond, this had both given to C & the Award was, that B should lay C the Bond. here, altho C was a Stranger to the award, yet as the payment of the Bond to C would be beneficial to A, by taking away his liability to pay it, the Award was held to be good. — And

1 Lev. 71. —

now such an Award is always to be taken, prima facie, as beneficial: So that to avoid it it is necessary for the prevailing party, to shew, that it is of no benefit to him: The unsuccessful party in this case has no reason to complain, for it is immaterial as to him, whether he performs the act awarded to the immediate party in the arbitrament, or to any other. If the act directed to be done by a Stranger,

Lyd. 103. 104. 125.

one of which the party act. when the award of bonds, was compel the performance by the Stranger the award is good. otherwise it is bad. —

An Award that one shall make a payment to such a person as the other shall appoint is good.

Hyd. 104. — If a controversy in which several are interested on the respective sides is submitted to arbitrament, the arbitr. may, according to the rule laid down, decide disputes between any two or more of them. Quod Mirum!

There is no decis. authorising this rule. it depends solely upon dicta of Judges

Finch. Rep. 180. 441. — If an Award order a release of all claims by one, who is trustee of a bond for the use of another; this bond is not included in the award unless it was itself the subject of the controversy. —

It is usual in a Submission, after pointing out what controversies are submitted, to go on thus, "ita quod" (so that) an award be made upon the premises &c. — A great distinction is made, where the "ita quod" is used & where it is not. The Submission may be general, of all controversies, disputes &c. or it may be particular, pointing out & specifying what particular disputes actions or controversies are submitted. If the Submission is general, of all controversies &c. with an ita quod, & one controversy only is decided; it is notwithstanding a good award, even tho' there were other controversies actually subsisting, provided no other was brot before the arbitrators. The fact that one only was heard may not appear on the face of the Award & if it does not, it may be proved by parol. &c. Such an Award at the made upon a Submission of all controversies is no ba. to an action brot upon others that were subsisting at the time of the Submission if they were not actually decided upon by the arbitrators.

8 Rep. 98. — Cro. Jac. 200. 355. — 1 Bur. 274. — 2 Burr. 140. — 2 Burr. 140.

Hyd. 114. 117. — Cob. 19. — Cro. Car. 210. — 1 Saund. 32. — Lib. 7. 38. — Lyd. 120.

But, if in case of such a general Submission, more controversies than one were actually brought up before the arbitrators & one only decided, the award would be void. For, the reason why a decision of only one controversy is good when all disputes &c. are submitted is, that — it is a presumption of law that there was no more than one

Cro. Eliz. 858. — controversy between the Parties. when therefore it in fact appears there were more, that were submitted to the arbitr. & not decided, this presumption is taken away & the award

Lyd. 120. — is not good. But it seems, the repugnant to reason, that if the submission is without the ita quod, the arbitr. may neglect to decide upon controversies actually brot before them & yet the award be good.

8 Rep. 98. — When certain controversies, specifically described,

Cro. Jac. 200, 355. — are submitted, w.th an ita quod the award must regard them alone, if any are omitted, the Award is ill. —

So, if in such case, any others than those specifically described even tho none of those specified are omitted, should be awarded about, the Award would be void as to those not included in the submiss.n — but it would be good as to those specific, unless there was an off-set awarded between those which were expressly mentioned in the submission & those which were not. —

8 Rep. 98. — If specific controversies are submitted without an ita quod, an award deciding only a part of the controversies submitted, is good. Quod Verum. & thus it would

Cro. Jac. 200. — seem even the other controversies ~~than~~ those awarded are actually brot before the arbitr. The rule is opposed in L. Bernardist. 315. —

Com. Rep. 157. — If two are mutual persons that submit to arbitrament, if the submission is with an ita quod, the Award must

Yo. 547. — be concerning them alone — ex. gr. A. & B. on one part & C. on

8 Rep. 98. — the other submit to arbitrament. — if the submiss.n is with

Lyd. 120. — an ita quod, & the award should be concerning a dispute

Bro. 349. — between B. & C. only, the Award would be bad even tho' no

Tr. Ent. 259. — other controversy were brot before the arbitr. — But if there

Lutw. 1028. — had been no ita quod the Award would have been good

Pl. Plas to Assumpsit Awards

Requisites of a good Award.

Ayl. 122. - Ftd. 52.a. 1. An Award must not wrong the law. - i.e. An award directing some unlawful act to be done, is ill.

1 Lev. 12. 2 Vent. 213. - An Award giving a remedy for that for which the law affords none was formerly void. Such an award is now good.

Ayl. 123. 2. An award must be possible to be performed. - For the legal intent of the sum possible, see contract p. 108. and Yet an Award that B procure Bar Co. a deed or pay a sum of money, is good, tho' it may be impossible to procure the deed. For, it is in the alternative & the arbitrators have fixed a sum to be paid in case the other requisition can not be complied with —

On such an Award in the alternative, a tender of performance of either of the things required is enough if it be at the election of the doer which to perform. -

Ayl. 120. 3. An Award must be reasonable. Thus if.

An Award that one party shall pay the other £ 100 is void; For it is unreasonable, as infringing on personal liberty. -

Co. Ent. 220. So an award ordering one of the parties to do something, that would inevitably subject him to a law suit is unreasonable & void. Upon the strength of this rule, it was formerly held that an award ordering A to leave money at B's house, was void, for it was said that if A should go into the house to pay the money he would subject himself to an action of trespass. But such an Award would undoubtedly be good at the present time. -

3 Lev. 153. -

2 Ld. 903. 2 Saund. 292. Co. Eq. Ch. 32. 2 Ch. 88. Ayl. 82. 83. 90. 2 Lev. 100. 4. An Award must be certain. Yet an award is not good if no time or place is fixed for performance; the time or place can be ascertained by intendment of law; reasonable time & the place that in such it was or should be paid, is in case of contracts. -

148. 6.

Of Plas le Humpsit. Awards.

1 Barnard. 84. 85. 151. 403. 2 Brownl. 311. 2 Keb. 970. 92. Cro. Car 383. 5 Rep. 77 Doc. Pl.

The old rule on this subject was this. If the Award did not contain within itself the certainty, if it did not set out precisely & perfectly, the act to be done & the method of performance, it was said — as where the Award was that A should say one half & B the other half of a certain land it was held to be void for uncertainty, because the amount of the said was no where shewn in the Award

1 Lutw. 1. Keb. 129. 3 Inc. 18. 5 Ray. 124. 248. 234. 112. 1071. 2 Lev. 242. Cro. Car. 325. Cro. Jac. 423. 12 Mod. 585-6. Keb. 90. 133. 135.

But now the rule is reduced to this. If an award on certain in itself, is capable of being rendered certain by an averment, it is good as, an award to pay costs. For, id certum est quod certum reddi potest. Or, if by referr. to something out of the Award itself as to the Examina. or to another certain thing, the Ct. can by a reasonable presumption conclude what was the intention of the arbitrators they will stay it to the Award. —

The former Courts seem to have gone upon the ground that if they could discover a construction by which the Aw. might be made uncertain, they would determine it bad — later Courts are apt to discover any rational construction by which to render it good

Vide author. cited above.

But still, if the award cannot be made out certain by averments or by a reference to other things it is void for uncertainty, as an award to pay what in conscience is due. —

2 Lev. 203. — Mod. 232. — 2 Ld Ray. 90. — 1 Lack. 75. —

5. An Award must be final. By this rule is meant, that an end must be put to the identical controversy submitted — i.e. no action can be had on the original dispute; the actions may arise out of the award itself. — Therefore, and Award, that the Ptff should enter a nonsuit in the cause submitted, was held not good because that was no bar to another action — But an order to enter a retraxit would be good as that is a bar to another action —

Formerly, when several controversies were submitted an Award was made that all controversies should cease tho' the words were sufficiently final yet the award was void, because there might be other controversies submitted. — Such an award in such a case is now good; for the award is understood to contemplate no other controversies than those submitted, & no others are affected by it notwithstanding the generality of the expression —

Vin. Abr. b. 2 Bl. Rep. 1117. — Kyd. 113. 114. 92. 1 Rol. Rep. 362. 2 Ld. 192. Cro. Jac. 563.

6. An Award must be mutual. — Formerly an award was not good unless something beneficial was awarded to both parties. — At a later period, the rigour of this rule was relaxed, & it was then argued not necessary that something should be awarded to both sides, but it was still required that if any thing were awarded to one party, the particular thing to which the award was intended as a satisfaction should be formally recited. The former of these rules is now entirely discarded; & as to the latter, it is now presumed, that an Award made on the submission of a controversy is intended as a satisfaction for that particular thing out of which the controversy arose — And if you will be at the understand your books. —

Cro. Jac. 354. 1 Lev. 132. — Hob. 44. 1 Ray. 244. Kyd. 117. &c. 2 Lev. 13.

Com. Dig. 328.

Of Pleas to Assumpsit — Awards.

In some cases, if a part of the Award is void, the whole is consequently so; in others the consequence does not follow. The rule under this head, is,

Cro. Jac. 584. 587. Yelv. 98. 10 Mod. 201. Ld. 1 Ld. 1 Ld. If there is mutuality in the award, & that part which gives Satisfaction to one side, for what is awarded to the other be void; the whole award is ill, ex. gr. According to the law as it formerly stood; if A were awarded to pay costs to B. & in consider. of this, part of the award B. were ordered to pay £10. to A; the whole would be void: because formerly, arbitrators could not award the payment of costs; & costs, in this case constituted B's Satisfaction.

The oldest rule upon this subject was, that if any part of the award was void, the whole was ill. Afterwards it became a rule that if any part was void, this never vitiated the whole but it was only ill pro tanto. But by a later authority this is denied to be law & the rule seems to be settled as above.

10 Co. 131. Hyd. 173.

12 Mod. 587. 590.

In some cases, when the award is in favor of one side only, the voidness of a part vitiates the whole as, if arbitrators decide matters not submitted & award an aggregate sum in favor of one party; the whole is ill, for, there might have been no damages given, if they had decided only those controversies which were submitted. Yet, if in this case, the particular sum awarded for each injury, had been kept distinct from the rest, the award would be good as to the controversies actually submitted & void as to the others. — A governing rule laid down by W. & under this head is this:—

Hyd. 165. 169.

If the justice of the case is, or may be, effected by the Award made on the controversies not submitted

Kyd. 155. 168. or by that part of the Award which is void; the whole Award is bad: But if the justice of the case can not be thus effected; the award as to the controversies submitted may be good, & as to the rest void. As, if what is awarded in favor of one party is void, & that which is awarded against him is good; in this case, if the party mentioned can receive the full benefit of what is awarded to him, without its being actually performed, the award as against him remains good: Exp. If the award be that B makes a release to A; & that A in consid. of the release, pay B a certain sum, & the arb. as to the release be void; yet the award as to the sum to be paid by A is good; for the award itself is as good a security to A, as a release. —

2 Ray. 115. —

Kyd. 174. 177. —

Pow. on Con. 318. If one party has actually received what was awarded to him, he is bound to perform his part, even tho' that part of the award which was in his favor, was in itself void.

Kyd. 177. —

If one is required by an award to give a bond with sureties, a bond in his own name only is said to be a sufficient performance; & he cannot be compelled to do more, for he can compel no person to be his surety.

Cro. Eliz. 432. 2 Leon. 32. 2 Lev. 6. Kyd 166 &c.

C. Pleas to Assumpsit — Awards.

Kyd 74. 2 Cont. 240. 1 Ld. 155. 7 Ld. 125. The award, that if the submission is in writing, the award must be written, is not fabricated by authority. If indeed, the submission requires it in express terms, to be written, there is no doubt but that it must be in writing; but that it must always be written when the submission is in writing, is by no means true. —

Palm. 109. Barnes Notes 55. 2 Dur. & Cont. — Now for an award must conform to all the minute requisites pointed out in the submission, is not perhaps capable of being precisely determined in every possible case. The general rule seems to be, that if any formality which adds any solemnity, or even the semblance of security, to the transaction, be required to attend the award, the requisition ought to be observed; but if the superfluous formality be entirely nugatory, it may be dispensed with.

4. Of Performance of the Award. —

Ante 151.b. 1 Ld. 353. 6 Mod. 34. Kyd. 181. — If an Award is substantially, tho' not literally complied with, it is a good performance.

If it be awarded, that a release be given by one party, that payment be afterwards made by the other, the money awarded to be paid is of course excluded out of the release. —

T. Ray. 109. — If according to the terms of the award, there is to be any precedency in the performance, the party directed to perform first must, on bringing an action, aver performance on his part. If there is no precedency, either may sue without such averment. —

Kyd. 182. 197. — If a person in whose favor an award is made, accepts a part, action, variant from the awarded, he cannot require any other performance.

Kyd. 183.

Formerly payment at a day, even previous to that fixed in the award was no bar to an action for non-performance. It has since been allowed to operate as a good bar, if the defdt. pleads, in the 3rd person, viz. "that it was paid on the day fixed". But it is probable that at this time a plea in the active voice might avail!! —

Kyd. 184. 201.

Formerly a tender of payment after the day fixed by the Award, was no bar to an action for breach of the Award: Such a tender, if made before a right of recovery has attached, by the commencement of a suit, is now a good bar. —

Kyd. 184. -

If it be awarded that A. lease to B. & that there be reserved on the lease £20, & covt. & B. fails to pay at the end of the year, such failure is no breach of the award: For the original dispute is at an end, & if B. does not pay, he is liable for a breach of covent. on the lease but not for breach of the award. The same would be the consequence, if a bond were awarded & being given were not paid according to the condition.

Str. 903. 1082.
Kyd. 188. -

If the terms made use of in the Award have received a legal construction different from the apparent import of the words, performance according to the legal meaning is always a good performance; as if the award be that the parties release up to the time of the Award, releases up to the time of the Submission is sufficient performance —

Ld. Ld. 151. a.
6 Mod. 34.

For the learned reasoning respecting the breach of an award that a suit pending, & submitted in term time should cease see Yelv. 35.

Yelv. 35. -

Of Pleas to Assumpsit — Awards —

5. Of the remedy to compel performance of an Award — & herein of the Decl.n & Pleadings. —

Ante 138. 6. — As to the remedy on a parole submission see p. 138. 6. —

1 Saund. 33. — If a suit be commenced for nonperformance, the
2 Lev. 120. — Dft must state in his decla.n the submission, the con
Cro. Jac. 640. — troversies left before the arb.rs, the award, the breach
Rep. 191. 203. — & if it be made necessary by the submission, or award
2 Show. 61. — a request on his part. ¶ in all cases where the Award is of a sum of money on demand, an actual request, con w.t to the rule in other cases, is necessary

If the breach assigned be in a bad part of the award a demurrer to the decl.n, may be plead. —

Rep. 192. — If breaches are assigned on more parts than one, of
Lenk. 204. — which some are good & others void; upon issue joined, or ill, the Jury give all for the Dft & give entire dam ages, the verdict is ill, & judg.t may be arrested — For the presumption is, that part of the damages was for breaches of void parts of the award. But if the damages for the respective breaches were several & distinct, the verdict as to the breaches of the good part of the awa would stand, & be ill as to the rest.

1 L. Ray. 114. — The Dft must not assign a breach in a void
123. — part of the Award, for a breach of that will not subject the Dft. he not being obliged to perform the void, bou

Yelv. 137. b. 139. a. As to the remedy for non-performance, when the submission is by bond, see S. 13. 7. 13. - Tender and refusal, it is said, in the case of such a bond, discharges the obligors whole duty - see S. 154. 164.

Ryd. 192. - 1 Bac. Ab. 92. 124. 135. - 114. Cro. Jac. 278. 2 Mod. 77. 1 Salk. 138. Cro. Jac. 220. - Yelv. 199. Carth. 115. 1 Burr. 278. 1 L'Ray. 713. When an action is brot on the arbitr.s bond, the Deft after oyer, pleads no award. The Pltff cannot as in other cases reply, that there was an award. For the Deft is understood to mean that there was no legal award, so that the dispute becomes a mere question of law & is not to be submitted to the jury. But the Pltff in this case must set forth, in his replication, the whole award in detail, & assign the breach: he must also state in his replicat.n an observance, on his part, of every thing required of him by the terms of the submiss.n - To this the Deft, if he relies on the illegality of the award, must demur; for the illegality if any is now apparent on the face of the record. If, however, the Deft intended to aver that there was in fact any award, he will rejoin "that there was no such award". -

4 Bac. Ab. 114. Ellis. 231. - When an action of debt is brought on the award itself, the Pltff need not set forth the whole award, but only that part of it which makes for him.

Ryd. 178. 250. 1 L'Ray. 122. 1 Sal. 73. If an award is void on one part, & good as to the other; & he at whom the void part was made would compel performance of the other; he must aver performance on his part, notwithstanding the award as agt him was void. -

In case of a fault on the bond, if the Deft wishes to deny the fact that he submitted, his plea must be non est factum. For if he never submitted, the arbitr.s bond is not his act & deed. -

Yelv. 153. - Verdict for Pltff & judg. for Deft. See Yelv. 153 -

154. a.

C. Pleas to Assumpsit — Awards

Ld. 192
204. 204.

In most cases, when an award is set forth by the Pltf. & breach assigned, the assignment of the breach ought to be on a good part of the award only; But if the award as rec.d the Deft. is in the alternative, of which one part is good & the other ill, the Pltf must assign for breach that neither part has been performed —

+ Cro. Eliz. 391.
Ld. 192. 204.

+ It is said, in the com.-place books, that in a suit on an arbitration-bond, only one breach may be assigned in the replication. And the same rule applies in all cases of a suit upon a bond given as a security for performing any thing — ‡ As a single breach occasions a forfeiture of the bond, the assignment of one, appears in general, to be sufficient. But there can be no substantial reason why the Pltf. may not assign more than one — Indeed, from some expressions in Allison there is reason to doubt, whether the rigor of the rule is now enforced —

‡ But if more than one is assigned it must be taken advantage of by special dem.r & not at ll. 4. Bac. 46. 134. 5.

Allis. 294. 293.

If the Deft. after having had oyer of the bond, pleads performance or any collateral matter in bar, he, of course, admits the existence of a legal award. It is therefore, altogether unnecessary, in this case, for the Pltf. to set forth the award

Cro. Eliz. 838.

If the Deft. owns the existence of the award he cannot afterwards plead performance or any collateral matter, for that would be a departure. —

If the Deft. prays oyer, & sets forth the award, & avers that there was no other award; this is considered as a traverse of the validity of the award set forth; And the Pltf. may at his election, demur, or assign any other award. — Where there has been a revocation on the part of the Deft. & the writ is not on the Bond, the Deft. will plead no award the Pltf. must then, in the replication state the fact of the revocation by the Deft. & thus the Deft.'s liability will appear upon the face of the record —

8 Rep. 81.

Of Pleas to A. Summ. — Awards —

Kyd. 100. 207. If the award be void in part & in part good the Deft having stated it as it is, may plead performance of the good without noticing the ill, part. —

Kyd. 208. Tender & refusal of the thing awarded are as good a bar as performance — But in pleading, the Deft must aver, that he is still ready to perform —

+ Vid. 153. —

1 Saund. 320. If the Deft, after oyer, sets out the award partially, & pleads performance, the Pltf may reply by setting out the whole award, & pleading, that he ought not to be barred without that, there was no other award than that stated by the Deft —

3 Burr. 591. — If the time limited for making an award is by agreement enlarged, after the bonds are given, neither party is liable to a forfeiture of his bond for non-compliance with the award, if made after the time originally limited in the bonds. —

2 Lutw. 1243. — Chancery will enforce the performance of an award, for a collateral thing, when the submission was by rule of that Ct: And in case of an award for money, if the award was made under the rule of that or any other Ct. an attachment will issue for non compliance — In other cases the parties are left to their remedy at Law —

155. a.

Of Pleas to Assumpsit — Awards.

4th. 74.
2 Vern. 24.
3 P. Wms 187.
Ryd. 219.

If by an agreement subsequent to the award a party engages to perform what the award requires of him, Ch.y will decree a specific performance, on the ground, not of the award, but of the agreement, & acquiescence in & ratification by the parties, is proof of such agreement. Let, in proving the agreement, Ch.y, in this, as in all other cases will refuse to compel a party to disclose a fact which would subject him to a penalty — Why a Ct. of Ch.y should make this distinction between a penalty & damages it is not easy to discover. — Even where the Aw.d was originally defective, but had been acquiesced in by the parties for some time, Ch.y refused to set it aside —

Pow. on Con. 318.

Ryd. 225.

O. Of the manner of setting aside Awards.

In Eng.d a Ct. of law will never set aside an award on account of any extrinsic circumstances; as corruption, partiality &c. unless the reference to arbitram.t was by a rule of the Ct. applied to — (Qu. 4 Durn. 589.)

2 Ray. 857.
Ryd. 220. &c.

If therefore, a reference to arbitram.t was not by a rule of Ct., the award founded on the reference cannot be set aside for any thing extrinsic except in Chancery, and it seems from the case in 2 Wils. 149. that in an action of debt upon the award, partiality &c. in the arb.r is no defence. —

2 Wils. 315. 2 Wils. 149. 1 Ca. in Ch.y 276. 3. 4th. 529. 490.

In C. application may be made to a Ct. of law to set aside an award, as well for extrinsic causes as for matters appearing on the face of the award itself — And this may be done, whether the submission was made a rule of Ct. or not — That is, in a suit upon such an award before any Ct. these circumstances may be heard by the Def.t as a bar to the Pl.ff recovery.

Sheldon v. Roberts. Lat. Ct.

In Eng. Ct. of Ch.y will set aside an award made upon submission by rule of any other Ct., if there has been corruption &c. which has not been suggested in time to prevent the acceptance of the Aw. and by the Ct. who granted the rule for submission —

2. 4th. 155. 390.

Of Pleas to Assumpt. & Awards -

2 Vern. 515. 485. 357. 101. 251. - 2 Ves. 216. 317. - 3 P. Wms. 362. Kyd. 238. -

Not only corruption in the Arbs. but any circumstances that evince partiality towards either of the parties, or any unfairness or improper conduct, are sufficient grounds for Chancery to vacate the Award -

2 Vern. 765. - Kyd. 241. 239. 2 Sw. 17. 3 Atk. 494. -

A mistake in law or fact, not appearing on the face of the Award, is not of itself sufficient to induce a Ct. of Ch.y. to annul the Award. - And that Ct. will not go into an enquiry on averment made of such a mistake - But if the mistake appears on the face of the Award itself, Ch.y will vacate it, unless the mistake be on a doubtful point of law - If it is apparent on the face of the Award, that the Arbs. have gone contrary to their own principles the Award will be set aside.

Where the Arbs. have made a mistake in calculation or the casting up of figures, &c. & this is apparent on the face of the Award, Ch.y will not vacate the Award, but rectify the mistake, & suffer it to stand. -

1 Atk. 77. 64. Kyd. 239.

If any important fact is concealed from the Arbs. by either of the parties, & the Arb. or one of them, will swear that a knowledge of the fact concealed, would have altered his or their opinion, Ch.y will vacate the Aw. on the presumption of fraud; but if he swears that it would have had no effect on the award, Ch.y will not vacate it.

Kyd. 241. 2 Dunf. 781. -

In Eng.d when an Award is made under a rule of Ct., if the Arbs. were ignorant of some important fact, which could not be brot forward at the time of the Award, the Ct. will, upon motion, remit the award to the Arbs. for reconsideration -

Of Pleas to Assumpt. & Awards –

7. When the Pff may sue on the orig.l cause of action –

*Ibid. 137. Hyo. 243. 1 Ray. 248. H. 102.

As a general rule, a legal award is a bar to any suit on the original cause of action – But, formerly, in case no bonds were given, if the time fixed for performance had elapsed, without performance by either party, the Pff might consider the Aw.d as a nullity & sue on his original claim – At the present time, however, his remedy is upon the Award itself – And, if he should sue on the orig.l claim, the Deft may plead the Award in bar, even tho' he has not performed it, except it be an Aw.d that is void in part, then he must plead performance of the good part.

2 Saund. 292

1 Lack. 69. 1 Ray. 248.

It appears from the authorities, to be a rule, that, if the Award does not create a new duty, or give a new right of recovery (~~no bonds were given~~ aside from that upon the bonds), as, an award that all suits should cease &c. or in any other case where the Award operates merely to extinguish ~~the~~ old claim, this is no bar to a suit on the orig.l claim. This, tho' clearly supported to principle, appears to be established by auth.

Com. Rep. 328.

An Award may sometimes be taken advantage of, by persons not parties to it – as, if one of two joint trespassers submit to arbitr.n & an award be made, this may be plead in bar to an action agt the other trespasser, if it has been performed – But the efficacy of such a plea in this case, appears to depend wholly on the circumstance of the satisfaction received & not upon the award itself. For before acceptance of the satisf.n by the party injured such an award cannot be pleaded in this case –

And in all cases where a recovery in a suit at law may be plead as a bar to an action agt a different person, there, also may an award between diff.t parties be plead –

There is an old adjudicat. that after a submission, & before an Award made, neither party can recover in a suit on the original cause of action, without an express revocation – The bringing the suit not being construed as a rev.n – Sed qu.

IV. Of Tender. —

Doug. 659. Tender is a good plea in bar to all actions, in which the demand or damages are certain, or capable of being ascertained by any determinate rule; as in Debt. So, in indeb. Ass. on a quantum valebat, or quantum meruit, the market-price may be tendered. In trespass also, if the damages are certain, as being fixed by law or assessed by the parties, tender may be pleaded. But in all actions, in which from their nature the damages are uncertain or presumptive tender is a bad plea. It is a good plea to trover, for money.

4 Ind. 160. 2 T. Rep. 27. 1 Str. 25 D. 570.

7 Ind. 159.

If a tender is made, & the tenderor when sued brings the money into Ct. he is entitled to his costs.

If the Deft. lays money into Ct. & the Pltff. notwithstands proceeds to trial, and a verdict is given against him (the Deft.) he is not entitled to costs, even to the time of the payment into Ct. Aliter, if the Pltff. does not proceed.

4 T. Rep. 10. 11. 4 Ind. 160.

Payment of money into Ct. is an admission, that something is due to the Pltff.

2 T. Rep. 280.

It has been a question, who, after a tender, is the owner of the money tendered.

It is clear, established law, that if a note is given for any thing except money, a tender discharges the note; & renders it incapable of being received. That the property tendered is absolutely vested in the tenderee — nor is the tenderor in this case under any obligation to keep, as bailee, the thing tendered. — (vide 150.)

2 Burr. 27. 1 Sw. 405. 20 Eng. R. 1 vol. 8. 3 Lev 24.

But when the note is given for money, it is contended, by some, that the tender does not discharge it. For, the note is still sufficiently efficacious to entitle the holder to recover his money by suit, & also capable of being rendered as effective as it originally was, by a subsequent refusal on the part of the tenderor to deliver the money on demand. — Whereas, if the note were extinguished it could have no efficacy; nor could it be revived by any matter ex post facto. — But Mr R. supposes that the note for money is in fact discharged, & the property in the money vested in the creditor by the tender. — But that the tenderor is by law constituted a bailee to keep the money, & that he is not permitted to avail himself of his defence, unless he will deliver the money. —

Kirb. 203. Abb. 20 Ca. P. Kay 254. cont. 2 id. 92.

It is also objected to Mr R's doctrine, that the suit is always brought on the note; whereas if the property vested by the tender, in the creditor, some other action would seem more proper. — To this it is answered: that the reason for bringing the action on the note, is, that the law will not suffer the creditor to recover his money without bringing such an action as will lodge the note with the Ct. lest at a future time it might be brought forward against the tenderor.

Yet in cases where other articles than money are tendered & refused, the tenderee may, if the articles are afterwards kept by the tenderor & not delivered on demand, sue for them in trover, instead of bringing his action on the note. The reason of this diversity in the two cases, appears to be this. The tenderor of money, is by law, obliged to keep it, till it is demanded by the tenderee: and as he (the tenderor) is thus made liable to be called on, he ought to be answered in the manner most conducive to his benefit. But as the

* But he cannot support this action until he has tried the tender & the charges of keeping the articles.

tendror of any collateral article as cattle &c. is under no obligation to keep the articles tendered; the law does not shew him such indulgence: for he is not liable to be called on at all, except, on his own folly, in keeping as bailee articles which he is not in law, required to keep. And if he will make himself liable the tendree is not obliged to give on his note.

With regard to the principal question, whether the note is discharged by the tender of money, there are no Eng: adjudications directly in point. There are, however, two cases, in one of which it was held that the note drew no interest after the tender, & in the other, that a loss by depreciation in the value of the money should be borne by the tendree.

Comb. 334. Carth. 133.

Davis. 18. 2. Dyer. 81. 2. Bac. Ab. 5. 3.

The Judges of Pl. of Errors in Q. have considered the property of the money as vested in the tendree by the tender. And so long as the debtor does his duty as bailee, tender is as effectual as pay: & the obligation is dead.

To consider the note as reviving by a default of the tendror, tho' not altogether agreable to technical nicety, is not absurd or irrational: as a Stat. repealing or repealing Stat. revives the first. The most rational opinion, however, seems to be, that the note does not in fact revive on the subsequent refusal of the tendror; but as, in this case, he neglects his duty as bailee he shall not be allowed to avail himself of the discharge created by tender. Until he continues to do what the law requires of him he shall not avail himself of the advantage which the law has put in his hands.

In some law cases tender is a good plea where the damages sought are uncertain: as, on the case of an un-

Pl. 3. 15.

-voluntary Exchequer, tender of sufficient amends after action brought is a good discharge. But in all those cases where tender is a good plea to a demand uncertain in its amount, it is made so by stat. The principles of the Com. Law would not allow it —

Ibid. 178a. Where a penalty is given by stat. in C. tender is a good discharge, even after action commenced —

Co. Lit. 292. If in an action has been commenced, tender is no by the Eng. Com. law, a bar to the action: except in Mercantile a tender of the debt, interest & costs may be made at any time, & will be good. But by a stat. in Eng. a man by having obtained leave of Ct., may bring debt costs &c. to the time of his application for leave, in Ct. & this shall be made as a tender — by the rules of Ct. as a purse it — 5 Burr. 87. 89.

3 Inst. 87. f. It is a rule not to lapse left to pay money &c. in Ct. on

In C. without any stat. tender is good if made at any time before verdict. Yet, after the action is commenced legal costs, as well as principal & int. must be tendered.

Ibid. 13. 7.

By an old rule of Com. law money due on a personal duty which is defined to be such a duty as the bound may perform at any time during his own life) must be tendered, if at all, by the original debtor himself & not by his Ex. or heir —

Co. Lit. 206. 4 Rep. 123.

In all other cases, a tender by an heir, or Ex. is as good as one by the testator; & it is probable that, at the present time, the last rule would not be required —

Of Pleas to Assumpsit – Tender –

Of what constitutes a Tender –

2 Lev. 289.
3 Ib. 104.

To make a good Tender, money must be actually offered: It is not sufficient for the Debtor to say, that he is ready to pay – It is not necessary, however, actually to produce the money, if the creditor declares that he will not accept it –

3 Durn. 784.

Hr. 910.
5 Rep. 115.
3 Durn. 783.
2 Show. 910.

Tender of more than is due, is now good; For, "omne majus continet minus" – But, if the tenderee accepts more than his due, he is liable to refund –

Wade's case
5. Rep. 115.

Formerly, it was a question, whether Tender of money in a bag was a good tender; but it is now settled, that if there is enough in the bag, to discharge the debt, it is good; for it is the duty of the tenderee to count the money –

If a man engages to deliver one of two things, as the obligee shall chuse; a tender of one is no bar to an action – But if the election is not thus given to the obligee Mr. R. Tilthorne thinks that a tender of one would be good leaving it at the election of the obligor. This is the common usage – But as to this point opinions are contradictory –

In Eng. any money made current by proclamat. may be tendered –

In the U. S. any current money i.e. any money usually passing, is a good tender –

Tender of a large sum in coppers would not be good either in Eng. or U. S. but a tender being unreasonable –

101.a.

Of Pleas to Assumpsit — Tender —

5 Rep. 115.
Co. Lit. 208.
Ld. Ray. 403. —

If counterfeit money is tendered & accepted, the receiver must, according to an old Eng. authority, bear the loss — and this is a reasonable rule if the person who pays the money is ignorant of its being counterfeit & entirely innocent; for there is no reason, why one innocent man should suffer by such a misfortune more than another. & "Robin must die in the hands of the person, where he is found" — see an analogous case, 1 Bl. R. 39

1 Black. Rep. 390.
3. Bur. 1354. s.c.

By a stat. in C. the receiver may recover it back of the payer, if suit is had within a year —

Bank-notes have been considered in C. & G. as a good tender: And it is probable that they would now be so considered by Cts. of Law both in Eng. & U. S. — There has been no direct decision in Eng. upon the subject at law. So they have been considered as a good tender, if the tenderee made no objection because they were not cash. so where the tenderor offered to turn them into cash it was held a good tender — In the U. S. such a tender to be good for all purposes must be reasonable. a tender thru' the of Charleston Bank bills might not be good in C. because they are not there current —

Ibid. 130. 253 lib.

3 Burr. 1554.
1 Bur. 452. —

It is law by the old authorities that if an insufficient sum be tendered & accepted, the tenderee can have no remedy for the remainder — This rule is directly opposed to the equitable principles adopted in the action of indebitatus assumpsit. —

Co. Lit. 210. If no place is fixed for payment of money, it must be paid to the creditor wherever he is, unless he is out of the government; in which case the debtor is not obliged to pursue him — And the rule is, if the tenderor is ready to tender, but cannot tender, on account of the inaccessibility of the tenderee, he shall be entitled to all the benefits resulting from an actual tender — Tender & being ready to tender under the circumstance of inaccessibility are one & the same thing — This has been decided in C. in the cases of creditors going within the British lines in the late war, & thus putting out of the power of the Debtor to tender to their persons.

Co. Lit. 206. 207. 2 Ld. Raym. 378. 5 Rep. 115. Ibid. 184. 288-306. Tender by a mortgagor is a good bar to an action for foreclosure &c. & it gives the mortgagee a right of entry. And this case is an exception to the general rule that the money must be tendered to the person of the creditor, for the mortgagor may make the tender at any reasonable place on giving notice to the mortgagee — When this case stands as an exception to the general rule, no reason can be given —

So all cases of rent are an exception; for a tender of rent on the land, premises is good —

The rules already mentioned as to the place of making a tender, apply to money only. —

Does not this include every thing except money?

But for articles, if no place is fixed for delivery, must in general, be tendered to the creditor at his dwelling-house. And the dwelling-house in this case, is meant the residence of the creditor, at the time of entering into the obligation — Yet, in some cases, where the creditor has changed his residence, the tender must be made at his new place of abode — The rule of discrimination is this — If it is more inconvenient for the debtor to deliver the articles due at the new, than at the old

Of Pleas to Assumpsit. Tender.

residence of the creditor, he may tender them at the latter: Otherwise he must deliver them at the new dwelling of the creditor.

The obligee may direct the delivery to be made at any place, provided it is not more inconvenient to deliver the articles there, than at his dwelling house.

#Vid. 181. b. In some cases the obligee must be at the trouble of transporting the articles which he claims, — As when goods are purchased of a merchant at his store. For, in transactions of this kind, usage regulates the delivery.

*Vid. 181. b. The obligee must also call on Ex.rs or Adm.rs as also on public offices, for payment.

Of Tender at a time & place fixed.

Vid. 165. +If the time fixed, be on or before a particular day, the last day mentioned, is the legal time for making a tender. So if the time appointed be "the 10th day of or within a month after", the last day of the month following the tenth of is the legal time. Yet, in both these cases if the parties meet on a day before the last, the money may be then tendered.

Co. Lit. 211. Cro. Eliz. 73. Cro. Eliz. 14.

The time of day when the time for a tender, is the utmost convenient hour thereof; which is construed to be the last time at which the money can be counted with candle-light. And this time of day on the last day fixed by the contract must the tender be made if the lender is not there. Yet, in the other case, if the parties meet at some time of day before the utmost convenient hour

Co. Lit. 208. Lev. 524. Lev. 177. Co. Lit. 202. 3 Lev. 104. 3 Rep. 114.

1 Durn. 173. 174. the money may be lent and then — Qu. Is not the last moment of the day too enough for a tender? —

If the place is fixed, & not the time, the debtor must give notice to the creditor of the time when he will make payment. — And, if the time is reasonable, a tender of the money, or an attempt to tender, (if the creditor is not present being ready to tender is suff.) is good. — As to the time of day, & as to meeting at any time of day the rule is the same as before mentioned —

Co. Lit. 211. If neither time nor place is fixed, but money is
Yelv. 92. payable on demand, if the parties meet at any time or any where, the tender will be good — Otherwise the tenderor must notify the tenderee that on such a day, he will make a tender at his (the Cred.) dwelling-house, & on that day the tender will be good —

(In such case, however, of money payable on demand, a tender will never avail, after a demand on the part of the cred.; & equal to say this the creditor, if such demand be made within a reasonable time after the debt becomes due —) Qu.? —

If bonds notes &c. not negotiable are assigned, it has been questioned to whom the payment should be made after assignment — It is an established rule,
*Ind. 108. 254. 65. That the obligor must suffer no inconvenience from the assignment, & also that the money must not be due to the assignor, if he is a bankrupt, the obligor having notice of the assignment. — It is incumbent therefore on the assignee, to render the payment of the money to himself as convenient for the obligor as it would be to pay it to the assignor — The obligor will then be
Moor. 3. bound to make payment to the assignee — Such have

1136.

C. has to A. remised. Under

been the course of decisions in C. after much trouble & litigation. But the Eng. decisions are contradictory.

Co. Eng. 753. Id. 257. If A. promise B. to pay money to him, for the use of C. the money may be tendered to C. But it is said that if A. promise B. to pay money to C. a tender can be made to B. only & not to C. There is surely no, reason in these cases.

After tender & refusal, the tenderee should not for his money he must demand it in a reasonable manner - i.e. he must not demand it when it cannot be supposed that the tenderor should have it with him, as if he were absent from home &c. For the law shews no great indulgence to the tenderee, after having been so capricious as to refuse it once - neither will it oblige the tenderor to wait a limited time, to avoid great inconvenience for the purpose of complying with the demand immediately.

Of the consequences of tender & refusal

The first consequence is a stopping of the interest on the debt - no interest being recoverable after a tender & refusal, unless there is a subsequent demand by tenderee & refusal to pay by tenderor when the interest begins again.

Hob. 207.

Arch. 288. In case of a gratuitous mortgage, tender & refusal discharge the mortgagor, & the right of action; for

Co. Lit. 209. the obligation is discharged by the tender, & there being no pre-existing duty or consideration, the mortgagee has no ground on which to recover.

In case of other mortgages, pawns, &c. the heir of the mortgagee &c. is obliged by tender & refusal, the the old duty or his debt still remains.

Cro. Jac. 245. Yelv. 161. b.

If a single bill is given with a defeasance, tender & refusal of the sum named in the defeasance, discharges not only the penal part, but the whole duty. The reason of the difference as to the effect of tender & refusal, between a single & a penal bond it is not easy to discover.

Cro. Eliz. 755.

So in case of a bond given when there was no existing duty (as in submissions to arbitrament by bond), tender & refusal are a complete discharge of the whole.

9 Geo. 24. Co. Lit. 207. 1 Show. 129. 2 Rol. 523. Yelv. 153.

In some cases, a person by making a tender, acquires a right. As, if A. agrees with B. that if B. pay £10. on such a day, A. will grant him a lease of such a farm. In this case, B. by tendering the £10. acquires the same right to the lease, as if he had made actual payment; & becomes owner of the money.

Cro. Eliz. 888. Cro. Jac. 245. Lev. 686.

Also, where a man undertakes to do a collateral thing, & makes a tender of his service according to contract, the tenderor gains the same right that he would acquire by actual performance.

Indeed it is a general rule, in all these cases, in which a right is acquired by tender, that the right thus acquired, is as extensive as it would have been in case of actual performance. Thus if A. contracts with B. to build him a house for £100, & at the time appointed tenders his service, & B. refuses to employ him, A. is en-

Of Pleas to Assumpsit — Tender —

titled to the sum stipulated — This rule of law, if adopted in its full extent, will frequently operate very inequitably. And Mark doubts whether it would be rigidly adhered to in this State —

Of the manner of pleading a Tender —

2 Ray. 687. Salk. 624. Cro. Jac. 423. Ibid. 688. 2 Vent. 109.

In pleading a tender, it is not sufficient for the Def.t to aver, that he tendered "according to law," — but he must plead that he tendered "on such a day, at the uttermost convenient part of the day" — The uttermost convenient part of the day, however, need not be stated, unless the creditor was absent at the time fixed — The reason for this particularity is, that questions of law, respecting the legality of the tender, ought to be referred to the Ct. — It is also, necessary to state a refusal, if the tenderee was present at the time of the tender: and if he was not present, his absence must be stated.

2 Ray. 687. Cro. Eliz. 889.

Ibid. 162.

If payment was to be made "on or before" such a day, it is not sufficient to plead a tender before such a day, but the day of tender must be specified — 2 Lev. 23. 2 Vent. 109. Qu. If the parties met before the last day? —

Cro. Eliz. 889. 9 Rep. 79.

The Def.t must also plead, in case of money due that he always has been, & still is ready to pay the Pl.ff. & now tenders payment in Ct. which allegations must all be true; & he must bring the money into Ct. upon doing which, he recovers his cost —

Of Pleas to Assumpsit — Tender —

When the debtor after tender, has refused payment, it would be, on principle, sufficient for the Pff to reply, to the plea of tender by traversing the allegat. of the Deft. "that he has always been ready" &c. But the uniform practise has been to reply by stating at large the subsequent demand & refusal —

Tr. Ley. 254.
Salk. 522. —

If the Pff traverses the tender, the issue is found against him, he cannot in Eng. take the money tendered out of Ct. — Tho. Mck. subroses, that he does not finally lose his demand, but that he may recover it in another action — Yet by suffering a nonsuit the Pff might have taken his money out of Ct. —

Salk. 597. —

In C. the preceding rule respecting the effect of a traverse, by the Deft. is not adopted. —

If a tender is made of collateral things the Deft. must aver the time & place, but need not aver that he always has been ready &c. because this is not required of him, he having fulfilled his duty, by making the tender, without taking back the articles to seek. —

There has, however, in C.B. a discretionary practise of permitting the Deft., on motion, to bring into Ct. collateral articles wrongfully detained. — The practise obtains in cases, where it is apparent, that the restitution of the specific articles, rather than damages is the object of the suit — as when one is sued for withholding from the owner family-pictures, & other articles, the value of which is chiefly ideal. —

Of Pleas to Aſſt. – Payment &c.

Eſſ. 225.

V. Another plea to Aſſt. is Payment.–

Formerly, in Eng. payment was no plea to a Bond or other Specialty after the day fixed for payment; but now by Stat. the Deft. is permitted to avail himself of it as a defence.–

Performance of a collateral thing must, in Eng. be pleaded quo modo.–

In C. performance of a cont. to convey land must be pleaded to have been by deed; tho' many particulars which would be indispensably necessary in such a plea, on Eng. principles are not required here: Ex. gr. "By deed duly authenticated," is here considered as a sufficient description in a plea of performce. tho' in Eng. it would be necessary to state the manner in which the deed was authenticated.–

Co. Elz. 0 8.
2 P. Wms 308.

Where a person making a payment is indebted to the creditor in different demands as by Note & on book &c. he, the payer, has a right to direct to which of the demands it shall be applied.–

2 Str. 1104.
1194.

But if the debtor says it generally, without directing how it shall be applied at Law, the creditor may apply it to which he pleases: but it is observable in both the cases cited that it made no difference to the payer, for in one case, the demands were both simple cont. neither bearing interest, & in the other, they were ~~both~~ two bonds, both bearing interest. In Eq. the rule is that it shall always be applied to that demand which will be most for the benefit of the debtor, as, if one demand bears interest, & the other not, it shall be applied to the one bearing interest.

1 Vern. 24. 34.
3. Atk. 555. cont.

Promise to pay money of a certain denomin. as, pounds, shillings, & pence, in Eng. is understood to mean, ye money of ye place, where it is payable. – W. R. thinks ye. refers only to those cases, where the cont. respects some prop.y in ye place where ye pay. is to be made. In C. ye gen. understg. is, ye money is of ye place where ye cont. is executed.–

71 id. 113. a.
2 P. Wms 88. 095.

Pow. on C. 412.–
4 Vid. 5. 124.

VI. Another defence subsequ. ag. aſſt. is, that the cont. has been rescinded by the parties, or merged in a cont. of a higher nature.

Co. Lit. 291. b.

VII. A Release is a good plea to an actn. of Aſſt.–

Eſſ. 243.–
Co. Jac. 300. 170.
2 Mod. 2 Salk. 578. 1 Ld. 141.
Ld Ray. 235. 1095.

The term "all demands", in a release, is the most extensive one that can be made use of; for, it not only discharges all actns. Suits &c. but also, debita in præsenti, solvenda in futuro; but it

Co. Cliz. 605.b. 1 Lev. 99. does not extend to demands growing out of a covenant not broken, or to any accruing profit, as rent &c. nor to arbitration bonds, where the release is in pursuance of the award.

1 Pow. on C. 377. 388. 392. 394. 1 Lev. 101. 236. 274. 236. 250. Carth. 119. Cts however, will often confine the meaning & operation of such general express^ns to the subject matter of the release, & the apparent intentions of the parties.—

1 Salk. 180 VIII. Another defence ag^t. ass^t. is the plea of
7 Vid. 178.b. Foreign Attachment:— that the money for which the action
236. is brot has been attached in the deft^s. hands, for a debt
Ass. 105.b. of the plf^s.—
231.

2. Inc. 177 &c. Foreign attachment is allowed in C. only when the plf^s debtor is absent out of the State.— It is served by leaving the writ with the deft^s debtor, & binds the money in his hands, from the time of service.—

The manner of pleading this, is by stating in their order, "the indebtedness of the present plf^t. to him who brot the attachm^t., that the writ was returnable to such a ct., that the present deft. was served with the process, that default was made by the present plf^t., that judg^t. was recovered ag^t. him, & that the present deft. paid the original plf^t. on
1 Salk. 277 said judgm^t.". And the deft. should also be able to prove the indebtedness of the present plf^t. to the original plf^t.—

7 Vid. 235.a. After one is served with a foreign attachment, he cannot pay his creditor (the deft. to the first suit) but at his peril; & if his creditor sues him, he is to plead the foreign attachm^t.— Yet, if the deft. to the foreign attachment, having himself paid the demand, brings his action ag^t. his debtor, & he pleads the foreign attachment, payment is a good rebut^n.— In this last case, however, it is incumbent on the plf^t. to have given notice of his payment, to the deft.—

Of Pleas to Afs. - Foreign Attach.t - Insolvency -

If the deft. was sued by his creditor, before he was served with the foreign attachment, it seems that the foreign attach.t is no lien on the debt, but he must pay it to his creditor & not to the plf. in the foreign attach.t

Salk. 291. Cro. Eliz. 157.

Choses in action in the hands of an agent are proper objects of foreign attach.t; so far, that service of the process on the agent, will bind the money in his hands, if paid afterwards to him: And leaving a copy with the debtor obliges him to pay the agent thus served; or rather prevents him from paying it to any other person without injecting himself, even tho' another should become holder of the choses. - But this process does not prevent the agent from putting the choses out of his hands. -

IX. An act of insolvency is another defence.

An insolvent act, in another state has been considered by our Cts as a good bar to an action here. In the state of New York, it has been decided otherwise. A judg.t in one state is, indeed, a good bar to a recovery in an action for the same cause, in another. But that is by the express provision of the constitution.

Fed. 178.

Sets of insolvency operate only upon contracts, not on torts.

5 Durn. 696. An act.n of Trover is not barred by an act of bankruptcy, tho' it was in a case where the trover was concurr.t with an act.n for money had & rec.

Caes. 22.

An Act of Insolvency discharges debts due but not payable at the time of its being passed. - Indorsee of a Note not yet due is released under it. -

Action of Covenant broken —

2 Sw. 131.

A Covenant is a contract written & sealed.

1 Fonbl. 134. 5. — It has always been the practice of Cts to give Co-
3 Burr. 699. 1 Lev. 102. 1 Sid. 151. Esp. 271. — covenants a liberal construction. But, in dubious cases, the words are to be taken most strongly against the covenantor. —

1 Fonbl. 366. 371. — Covenants may not only be express as where the parties expressly covenant thus & thus, but they may also be constructive or implied: As,

Pow. on Cont. 242. — If A. lease land to B. reserving rent, this reservation amounts to a covenant on the part of B. to pay rent if he accepts the lease — This is the case, even
1 Fonbl. 375. — tho' the instrument be signed by A. only — For B's accepting the lease & going into possession, shews his intention of complying with the terms of the lease —

5 Rep. 17. Rol. 518. 2 Mod. 92. 1 Vent. 10. Palm. 388. Carth. 98. — Also, when one makes a lease, there is an implied cov.t on the part of the lessor, that the land is his; And if it be otherwise an act.n of cov.t lies ag.t him. —

11 Rep. 50. b. 4 Rep. 80. 5 Ed. 17. 18. — So, an exception in a deed, tho' the deed be signed
1 Rol. 431. — only by the grantor, is a cov.t or agreem.t on the part of the grantee, that the thing excepted shall not, hap —

Go
Cro. Eliz. 637. Moor. 553. Lack. 190. Carth. 232. Show. 388. — In a lease, an exception, it seems, does not amount to a covenant on the part of the lessee not to disturb the lessor but only an agreement between the parties, that the thing excepted shall not hap in the lease; unless the
1 Leon. 324. 117. Plowd. 67. cont.a — exception is of something dehors the leased premises, as a way, right of common &c — therefore, a bond given by
Cro. Car. 437. T. Ray. 14. 12 Mod. 24. 5. — the lessee to perform all cov.ts is not forfeited, by a hap on the thing excepted, unless it be something dehors &c.

Covenant broken.

Pow. on C. 317. Fl'id. 253. b.

Tho' at Com. Law, instruments obligatory are not negotiable; yet it has always been customary to sell choses in action: And such sale amounts to an implied cov.t on the part of the assignor, that the assignee should have the property of the chose in act.n & of course, that the assignor would not disturb him in the ownership of it. — If, then, the assignor himself receives the money due on such oblig.n or releases it to the obligor, he is liable in Eng. on the implied cov.t — In C. the practise in such cases has been, to sue the assgn.r for the fraud —

2d Ray. 683.

Fl'id. 173-4. a.

Dunf. 290. —

An assignment of a chose in action, need not be by deed — Qu. If the subject matter of the security cannot be conveyed but by deed? —

3d. Rep. 94.

Equity will not protect an assignment, unless it were made for a valuable consider.n —

Fl'id. 284. 103.

If after assignment, the debtor or obligor, pays the assignor, knowing him to be a bankrupt & knowing also, the assignment, he is liable, both here & in Eng. to pay the debt again, to the assignee. — Qu. Is it necessary in order to subject the obligor, in this case, that he should know the assignor to be a bankrupt, or even that he should be a bankrupt? —

If a person covenants not to sue his debtor for a certain time; this cov.t is no bar to an action by the covenantor; but if, in this case, he does sue, he is liable on the cov.t

1 Bac. 101. —

But a cov.t not to sue at all, operates as a release & is pleadable in bar; For, if the obligee should recover, he would be obliged to refund the whole — And such a cov.t

Hob. 210.

must be plead, not as a cov^t, but as a release; For, an instrument must always be plead according to its legal operation, by whatever name it may be called.

In all deeds of conveyance, except quit-claim, there are two covenants: 1. that the feoffor is seised — 2. that he warrants & will defend the estate conveyed —

When the feofee sues the feoffor on the cov^t of seisin, it is sufficient to shew that the feoffor was not seised, & the feoffee may sue before he is evicted —

Ep. 302. On the cov^t of warranty the feoffee cannot sue before eviction, & the eviction must be stated —

In an action on the cov^t of warranty the feoffee recovers his consideration-money, & all the damages he has sustained, and in C. the value of the land at the time of the eviction — On the cov^t of seisin, he recovers in Eng. only what he has paid & interest, but in C. the feofee may recover all his damages, in the last case —

Kirb. 3.

If one claiming title to the land conveyed, brings an action ag^t the feofee to recover it from him, the feofee must vouch in the feoffor, that is, he must notify him, of the suit, that he may appear & defend the title — And unless the feoffee thus gives the feoffor notice, he cannot after being evicted, recover the whole damages, even on the cov^t of warranty, tho he may still recover the consider^n-money, — but in a suit by the feoffee ag^t feoffor, for this, the latter may defend ag^t it by proving that he had a title, & if he proves this the Pl^ff will fail of a recovery, but it is supposed that the act^n of ejectment might after this be opened again, & a rehearing procured, when the feofee might succeed —

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The feoffee, after vouching in the feoffor, if the latter will not come in & defend, is obliged to make as good a defence as he can. —

The usual mode of giving the notice before mentioned, is by writing, but the late Eng. authorities are, that there is no necessity for its being written —

4 Durn. Rg. 3. 26.
584. Hob. 34.
Hardw. 171.
Cro. Eliz. 213.

The cov.t of warranty, in a conveyance, extends not to tortious claims or acts, unless it be expressly so stipulated —

A quit-claim deed, contains neither of the cov.s before mentioned: Yet, in some cases, the quit-claimant is answerable for a defect of title, in an action of indeb. assumps. — If the conveyance by Quit-claim is a bona fide contract, & not considered as a bargain of hazard, the consider.n may, if the title fails, be recovered back, in indeb. ass. — But if it is understood by the parties to be a bargain of hazard, & the grantee knowing, because the situation of the grantor's title, agrees to take it, no recovery can be thus had — The quit claim deed, does not of itself furnish evidence of hazard — In C. lands taken in execution, & land sold by Ex.r & Adm.r is commonly sold by Quit-claim —

Covenant.

Pow. on Cont. 128. 115.

An Ex. is liable on the covenants of his Testator, respecting even real property, if there is a possibility of his carrying them into execution — And if there is not, the heir must perform them, if he has assets —

When any article has been lent for a long time & becomes useless or out of repair doubts have arisen whether without an express cov. for the purpose the lessee is liable. After adjudication no & con. it was adjudged on a writ of error that he was not liable. —

Qr. If lease to B. a farm, on which there is no wood except timber-trees, & covenant that lessee shall have estovers, & afterwards destroy the trees, he shall be liable to lessee on his covenant? —

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Of Covenants which run with the land, and bind the Assignee.—

In case of leases, & assignment by the lessee, this principle will be found to pervade all the adjudications & is the rule in the case, viz. If the Assignee is in possession of the land leased, & in the enjoyment of the profits, at the time of the breach of any cov.t contained in the lease, he is liable tho' not named, provided the thing covenanted to be done, or concerning which something is covenanted to be done, be in esse at the time of making the lease, & be parcel of the thing demised. As, if there be a cov.t to repair houses, fences &c. on the leased premises, the Assignee is bound to performed, tho' the lessee in the lease covenanted only for himself, without mentioning his assigns;—So, he is bound by a cov.t to pay rent: for this, tho' not substantially, is said to be potentially in esse.— But if the cov.t relates to a thing, not in being at the time of the demise, the assignee is not bound unless named, i.e. unless the lessee covenants for himself & his assigns; as if it be to build a wall he is not bound, unless named.—

5. Rep. 16.-24.

Whether the assigns be named or not, the assign is not bound to perform a cov.t to do any thing, which is merely collateral to the thing demised, as to build an house, on some other part of the lessor's land; then the assignee is not bound, tho' he is named—

5. Co. 16.

But, if the covenant is for the benefit of the estate demised, the assignee is bound, tho' not named; as where the cov.t was to leave 15 acres, every year, untilled.—

Cro. Jac. 125.

1 Black. Rep. 351. 3 Bur. 1271. Doug. 441. 735. Sal. 81. Show. 340. — As the assignee is liable to the lessor only upon the ground of possession & enjoyment, & not upon any privity of contract between them, he is liable for those breaches only, which happened while he was in possession — And this extends to the cov.t for payment of rent as well as all other covenants, the assignee not being liable for rent that became due either before the assignment to him, or, if he assigns it over again, after such second assignment. — And the Ct. held, even where the assign.t was to a feme covert, or a bankrupt, that the assignee, making such assig.t, was discharged — Doug. 435. 2 Str. 1221.

But an under-lessee, or assignee of part of the term, is not liable to the lessor, upon any cov.ts unless it be for rent — qu. as to that? — Doug. 174. 1 Fonbl. 347. 8.

Covenant, however, will lie agt. an assignee of part of the thing demised — as, where lessor leased two houses, & lessee assigned one of them, assignee was held liable for a breach of the cov.t to repair. — Co. Car. 201. W. Jones. 245. Doug. 438.

In cases of assignment of leases, there is no apportionment of rent as between lessee & assignee, or one assignee & another — Ex. gr. If the lessee assign the lease, & his assignee continues in possess.n eleven months, & then assigns it to a third person, or resign it to the lessee, before the end of the year, when the rent becomes due, he is not, at law, liable for any part of the rent. — (But, will not Chancery compel him to account for the rent which accrued while he was in possess.n, if he assigned over to a bankrupt?) In such case, the 2.d assignee is liable for the whole year's rent.t which became due after the assign.t to him, tho he came in possess.n but a single day before it became due — 1 Fonbl. 350. 1. Vern. 163. 1 Fonbl. 375. 6. Pow. on M. 90.

The lessee is liable to the lessor, not only upon the ground of possession & enjoyment, but also upon the ground of his contract, for there is both a privity of estate & a privity of contract between him & the lessor — Doug. 730.

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therefore the lessee by Assignment, never rids himself of his liability to the lessor; the privity of contract still subsisting between them, tho' the privity of estate is destroyed —

1 Roll. 354. Cro. Jac. 334. 523. 1 Sid. 44; Cro. Car. 188.

But it is said that he may accept the assignee for his tenant, & by accepting rent of him, he discharges the lessee from all liability for a future neglect of payment. (Note, This amounts only to discharging the lessee from liability in an action of Debt for rent afterwards becoming due, & being unpaid for.)

Cro. Jac. 309. 4 Durnf. 94 Q. 8. 100. Fox. one M. 91.

If the the lessor accepts rent from the assignee, the lessee is still liable for the breach of any express cov.t tho committed by the assignee after assignment: and, in this case the lessor may institute suits both ag.t the lessee & assignee at the same time, for they are both liable. But if he recovers ag.t both, & one judg.t is paid, the other is of course discharged except as to the costs which must still be paid —

4 Durnf. 75. Fox. 91.

Where the lessor assigns his reversion, this Assignee has the same right ag.t the lessee as the lessor himself; but it is said that he cannot maintain an action ag.t the assignee of the lessee for there is neither privity of estate or contract between them; his remedy in this case being ag.t the lessee himself —

Cro. Eliz. 328. 3 Co. 23.

Of Covenants or Bonds of Indemnity.

+Vid. 174.b.

If a Sheriff takes a bond to secure himself ag.st the escape of one who has the liberty of the yard, & the prisoner escapes, the Sheriff may immediately sue on the bond of indemnity, upon the ground of his mere liability; he is not obliged to wait, till sued himself by the creditor.—

3 Burst. 234. Salk. 196. 5 Co. Rep. 24. +Vid. 380. 5 Durnf. 307. 2 Ab. 160. 4. Ab. 714. arg.: 3 Ab. 377. 1. Ab. 599. 2 Ab. 040. Cowp. 525.

So, if one, being bound as Surety, in a bond with another, takes of the other a counter-bond of indemnity, & the debtor fails to discharge the former, as soon as it becomes due, the counter-bond is immediately forfeited; because the condition of the former bond being broken, the Surety has become liable to the creditor.—

In cases of the kind last mentioned, whether mere liability alone gives the Surety a right of action ag.st the principal, or whether he must wait, till he has been actually subjected, is a question that has been det.d both ways, by the Sup.r Ct. of C.— The Ct. of Errors, have decided, that liability alone is suff.t to create a right of action.—

2 Sw. 150.

2 Durnf. 1045. +Vid. 131

If the principal has been compelled to pay the Surety, on the mere liability of the latter, & is afterwards obliged to pay the creditor; Chancery will oblige the Surety to refund.— Might not the same relief be obtained by indeb. ass.t?—

2 Bur. 1005. +Vid. 130.b.

If a Surety, who has taken no bond of indemnity, has paid the debt of the principal, he may recover the money of the latter by an action of indeb. ass.t. Formerly, he could not.—

2 Durnf. 1045. +Vid. 129.

But, if one obligates himself in a bond, as Surety, for a debt already due, or becomes joint-obligor in a single bill & to secure himself, takes of the Debtor a bond to save harmless; no right of action accrues on this bond of indemnity before actual damnification. For it would be absurd to consider the bond of indemnity in these

Salk. 190.

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cases, forfeited upon the mere liability of the surety, since, in both instances, his liability commences from the moment of his becoming surety. If, in these cases, a right of action accrued on the mere liability of the surety, it would follow that a bond given with condition to be void on the event of the obligor's saving the obligee harmless, would be forfeited at the moment of its execution. —

Covenant by or against the Heir or Executor.

Ejp. 208. Covenants are either real or personal: those annexed to the land being called real; those annexed to the person, personal.

Ejp. 296. On the death of the covenantee, the personal cov.ts in all cases devend to the Ex.r: he is the person to sue for a breach of them. — If the cov.ts are to the real cov.ts the rule is thus

2 Lev. 25. If the breach of the cov.t happened before the death of the covenantee, he becomes entitled by such breach, to damages: as these are personal, he only, the right to sue for them

descends to the ex^r: but if the breach did not happen until after the death of the covenantee, the heir is the proper person to institute the suit, because, the land descends to him with the cov^ts annexed to it, & as both belong to him, he is the proper person to sue for a breach —

2 Lev. 92. Skin. 305. Salk. 141.

When the covenanter dies, act^ns for breach of personal cov^ts is always to be brot. ag^t Ex^r. For the breach of a cov^t real it is also to be brot ag^t him, when the breach happened before the death of the covenanter. But if the breach happened after his death, the heir is liable & not the ex^r; upon the idea of his taking the land with the cov^ts annexed. — And, in such case, of an action brot ag^t the heir, upon cov^ts running with the land, he cannot plead infancy in bar.

Vid. 132. b. 4 Durn. 7^r.

In the last case, as the possession & ownership of the land is the ground of the heir's liability, if the land in any case goes to the Ex^r as upon a devise for pay^t of debts &c. he is liable, & not the heir, altho' the breach happened after the death of the covenanter. —

1 Wils. 4. Salk. 317. Hob. 188.

The above is the law of Eng. — In C. the Ex^r is liable, in all cases, whether the breach happened before, or after, the death of the covenanter —

If a lessee covenants with his lessor, to do certain acts, & dies, & a breach happens after the time limited under the law of C. for the exhibition of claims ag^t the lessee's estate, still his ex^r is liable on the cov^t, notwithstanding the Stat. — Indeed the Stat. of C. contemplated such subsequent liability, when it allowed the Ex^r to secure himself ag^t future claims, by taking bonds to wind of those entitled to the testator's estate. —

Vid. 88.

A distinction, has, however, been made by the Sup^r Ct. between cases of this kind, in which there is no existing claim within the time limited by Stat. & in which the claimant has no power to create a claim within that time; and those

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cases in which the claimant can, if he pleases, by some act of his own, create a claim ag.t the Ex.r within the time thus limited.— As, where the claimant may raise the claim in his own favor, by some act to be done by himself. which act, by the nature of the cont. is one that may be performed at any time during his life— In this case, the Supr. Ct. adjudged the ex.r not liable, unless the claimant created the demand within the time limited by Stat.— This decis.n evidently limited the oper.n of the cont. contrary to the intent of the contracting parties.— In case of insolvent estates, the claim.t is allowed no average, in either of the above cases.—

Grant vs. Painter.

Of the Declaration & Pleadings.—

In an action on cov.t it is necessary to assign a breach coextensive with the import of the cov.t ~~as~~ if lessor covenants that he is seized in fee it is suff.t to state that lessor was not seized in fee.—

Cro. Jac. 309. 9 Co. D.

But if the breach be occasioned by the act of some third person, it is not sufficient to state a breach generally as, if the cov.t be, that the lessee shall enjoy without let, molestation &c. it is not sufficient to assign for breach that he has not enjoyed without let &c. for the interrupt may have been by a wrong-doer, ag.t which the cov.t does no

Cro. Eliz. 914. 1 Lev. 83. Vaug. 6. 121.

secure: therefore, the lessee in this case, must state the specific breaches, & shew that the molestation was legal. — And, if the lessee has been evicted by judgt. of Ct. he need only shew the judgt. to prove the molestation legal: Otherwise, he must shew the defect of the lessor's title. —

1 Str. 232. If the Pltf declares on a covt. which he sets out, & then assigns a breach under a "viz." inconsistent with the covt. it shall not destroy the Dect. but be rejected. —

1 Leon. 250. 1 Str. 229. Where a covt. is in the alternative a breach must be assigned of both the acts covenanted to be done. —

Where the covt. is to pay a sum certain there can be

2 Lev. 124. — no apportionment of the demand; as, where the covt. was to pay £3 pr. ton for freight of goods & Pltf declared for so many tons, & one hogshead, — it was held to be ill. — But, the Pltf

Lack. 638. — having thus demanded too much, may enter a remittitur for what he has claimed too much, & take judgt. for the rest. —

7 Vin. 253. 108 b. A release, by a lessee, of damages incurred by a breach of covt. on the part of the lessor, after assignment

Cro. Car. 503. of the lease by lessee, is void: for, a lease at com. law

2 Rol. 411. — is negotiable; & the rule is, That, if the instrument is negotiable at com. Law, the obligee cannot release after assignment: tho' if it is not negotiable, he may

4 Durn. 590. — release it, even after assignment. — But, will not Ct. of Law in any case take notice of an assignment? —

In C. the Dft. often pleads, that "he has not broken the covt." This, however, is a very irregular mode of pleading, & if the Pltf demurs, the Dft. must change his plea: for the Ct. have never allowed this mode of pleading, to be legal; for it tends to refer questions of law to the jury. —

Covenant.

Co. Lit. 303.
Cro. Jac. 300.
Salk. 498.
Cro. Eliz. 749.
Show. 1.
1 Bac. 88, 91.4.

If cov.ts sued upon, are affirmative, the Def.t must plead performance, not in general terms, but the specific performance of the particulars covenanted to be done. But it is apprehended that pleading in general terms, is cured by verdict.

1 Bac. Ab. 91.4.

If the cov.ts are in the negative, the Def.t cannot plead an observance of them quomodo. He must, therefore, plead in general that he has not done the things covenanted against. Note, these rules with regard to pleading to affirmative & negative covenants are different from those laid down in Espinasse.

Esp. 305.

There is an exception to the rule of pleading in actions on affirmative cov.ts where the cov.ts are very numerous; or rather where the things covenanted to be done are very numerous. In these cases the rule that performance of every particular must be expressly pleaded is dispensed with.

Cro. Eliz. 749.
916.
1 Bac. 91.4.

Flo. 172.a.
4 Bac. 92.1.
Ld. Ray. 681.

In actions on bonds or cov.ts to save harmless, the Def.t must in general, plead that he has saved the Pl.ff harmless & also, plead the particular act, or acts by which he saved the Pl.ff harmless. But, in some cases the Def.t may make a general negative plea, viz. non damnificatus "the Pl.ff has not been damnified." The rule of distinction is this: When according to the terms of the oblig.n the Pl.ff is to be indemnified on a.c.t some particular thing by some particular act of the Def.t as a release, acquittal &c. the Def.t must plead quomodo; if he does not, however, but plead generally non damnificatus the Pl.ff must take advantage of it by special demurrer;

Carth. 374.

Ld. Ray. 681.
1 Bac. 92.4.
Carth. 374.
Cro. Jac. 303.
Cro. Eliz. 910.
2 Co. 24.b.

But when the bond or cov.t is to save the Def.t harmless from any trouble, cost, damage &c. expressed in general terms, non damnificatus is a good plea. But if the Def.t instead of pleading this, as he may should under

take to lead affirmatively, that he has saved the plf. harmless. he must state quo modo. —

When the Def. pleads non damnificatus the plt. cannot reply by traversing, & saying generally that he has been damnified, but he must reply the manner in which he has been damnified —

If joint & several covenants.

Flet. 182. 251. 291. 3 Burr. 782. If three persons are bound jointly & severally, the three may be sued together, or one, but two of the three cannot be sued alone; For, the cont. must be treated as wholly joint or wholly several —

2 Burr. 282. If two or more are jointly interested in a right of action, all must join in the action brought.

5 Rep. 19. 1 Show. 8. 3 Mod. 203. When in an oblig. the obligees express themselves jointly & severally interested in some cases they are jointly interested only; as if it appears by the terms of the cont. that they have a joint interest, they must all join in a suit, tho' they are expressed as being interested jointly and severally — So if the interest is not joint, altho' the express. are the same, they may sue severally — Qu. Will not the interest be considered as joint, unless it appears to be several? —

3 Burr. 1480 to 484

4 Burr. 579. Flet. 133. One of two or more joint creditors, may release, sue, & do many other acts, so as to bind the others. —

1 Str. 553. 4 Bac. 116. When two persons are jointly & severally bound, one may be sued for the neglect of the other — & judg. against one is no bar as to the other; tho' satisfaction of the judg. would be. —

If there be an indenture recitng that A. B. & C. are bound on one part &c. & it happens that C. did not execute the obleg. the plf. may still sue A. & B. averring that C. failed to execute —

170.a.

Of the Action of Account.

2 Lev. 148.
Co. Lit. 172.

In the action of Account, when the def. recovers, there are always two judgments. The first judg.t is "that the def.t account" quod computet. On this, nothing is recovered, but the Ct. then appoints auditors to hear & examine the accounts of the parties. When the auditors have examined, &c. they report the result to the Ct. by which they were appointed; & judg.t issues on this return of the auditors as on a verdict.

Before auditors the parties are of common right entitled to testify; they are even required to do it, & on refusal, may be imprisoned.

If the Def.t will not appear before the auditors the Pl.ts whole demand will be found & returned to Ct. This is the case both in Eng. & C.

It may also be that the def.t will have a balance found in his favor & returned.

Co. Lit. 172.

At Com. law, this action lay ag.t a Guardian, a Bailiff, i.e. one who has received the lands & goods of another person, to improve for the owner, & who is to be allowed wages for so doing; and ag.t a Receiver, who is a person that has received money to another use, or who has rec.d the money of another person to improve with in merchandizing, and rendered account with or without wages according to circumstances. Note, in C. no distinction is made between a bailiff & a receiver.

Co. Lit. 172.
1 Rol. 116.
Co. Lit. 89.
Cro. Car. 229.

This action lies only on the ground of a privity of contract between the parties, created by themselves or by act of law. & cause it lies for no tort. To this last rule there is one exception: Where one has tilled & taken the land of an infant, the latter is not obliged to

consider him as a wrongdoer: he may sue him in an
+Vid. 3 Bl. 48 a. actn. of Account for the rents & profits while he was in possn. of the land.—

Neither will Acct. lie, for any breach of trust, or negligence arising out of a bailment of personal property, unless such bailmt. was made for the purpose of merchandizing or making profit with, so that the ptf. is a Bailee or Receiver.—

1 Salk. 1. If a person receives articles of another, for the purpose of accounting, this actn. lies agt. him. If he expressly promises to account, this actn. or a special ass. lies. If in the last case the promise is reduced to the form of a cont. or bond, still the ptf. has his election to sue in the actn. of acct. or on the bond or cont.— So in Eqy. a bill in Chancery is in all instances concurrent with an action of Acct.: its design & effect is the same as those of the actn. at Law, & it has of late almost entirely superseded the latter. In C. it is questionable, whether a bill can be filed in Eqy. in ordinary cases, where an actn. of Acct. will lie— The practice always is to bring the actn. at Law & it is a very frequent one.— If one receives a sum of money of another under such circumstances as will support an actn. of Acct. but makes no promise to acct. indeb. ass. is there concurrent with the actn. of acct.—

Co. Jac. 205. But where there is no privity, as of money lent, the actn. of acct. will not lie agt. the parties for it is essentially characteristic of this actn. that the parties themselves may testify; & their right to testify rests on the ground of trust & confidence reposed: where there is the idea of trust & confidence, between the parties, is excluded, they have no right to testify: and where there is no privity of contract, such trust cannot be implied.—

177.a.

Account.—

At com. law, an ex^r or adm^r could not sue or be sued in this action, for want of privity. But, by a Stat. of Anne the action is extended to them; as also to co-partners, tenants in common, & joint tenants.—

& Stat. of C. has extended the act^n of acct. to all the cases except that of an ex^r & adm^r comprised in the Stat. of Anne. But notwithstanding this omission, in our Stat. practice has extended the act^n to ex^r & adm^r as well as to tenants in common &c.—

In an act^n of Acc^t the declaration states, that the xxx def^t rec^d the money, & rend. of the plf. as bailiff & receiver to render his acc^t thereof when reasonably required &c. & the plf. demands the def^ts reasonable acc^t.— In the case of Partner, &c, the declar^n states that the def^t has received more than his part &c.

The Gen. Issue to this act^n is "no bailiff or receiver".

The def^t may plead any thing which renders it unreasonable, at the time of trial, that he should account as, the gen. issue — "a release — a discharge" — "that he has fully accounted" &c. But, if the def^t pleads this last plea he cannot go on before the C^t (as is frequently attempted to be done) & shew that he owes the Pl^f nothing, for that would make the C^t do the business of the auditors; but when he pleads that he has fully accounted he must prove that fact to the C^t; & shew that he has actually accounted with the pl^f.—

4 Bac. 85.

When the judg^t of the C^t is that the def^t is no bailiff or receiver, or that he has fully accounted &c. it is evident there is no necessity for a reference to auditors, but the def^t has judg^t for his cost^s as in ordinary cases.—

3 Wils. 73.
4 Bac. 85.

The deft. cannot shew before the auditors, any thing which he might have pleaded before the Ct. &c cannot, therefore, plead before the auditors, that "he has fully accounted" that "he is not Bailiff & Receiver" &c —

But, it is good accounting before auditors, to shew any thing, which, in any other action, would free the deft. from liability; as payment &c —

A Justice of the Peace, in this State, has no power to appoint auditors; therefore, if an actn. of Acct. be brot before a Justice, he must act as auditor himself. —

178 a.

Of the action of Debt.

3 Leon. 101.
Yelv. 197.
2 Lev. 28.
Vid. 124 b

The action of Debt lies in general, to recover an liquidated or certain sum of money, whether it be due by a writing or a parole contract, in some cases, whether there has been any contract at all is immaterial if the sum demanded be certain; as in case of a penalty given by a stat. — here it is impossible there should have been any contract between the parties to get at it at all. —

Vid. 100. a.

4 Rep. 94.
Cyf. 200.
2 H. Rep. 1221.
Doug. 603 n. 4.
4 Black. 249.

It was a rule formerly, that in an action of debt the exact sum demanded must be recovered, or nothing at all. This rule of late has been much relaxed. —

Cro. Car. 539.
Yelv. 206.

The action of debt will sometimes lie, upon a judgment of Ct. to recover the sum adjudged to the Pltf. — It has been a question in C. whether it would lie, where the Pltf. may take out ex.n for the sum. As it would answer no good purpose (interest never being recovered on a cont. in C. unless it has been expressly reserved) there seem no reason for sustaining it. — By the com. law interest is always allowed upon a liquidated debt, after it becomes payable. From some late adjudic.ns it is probable that the same rule is coming into use in C. — If this should be the case, Debt on Judg.t might be brought in cases where ex.n might issue in order to recover the interest. —

Vid. 308. 411.
33 r.
Vid. 113 & 10.

In Eng. debt on Judg.t lies after a year & a day from the rendering of the judg.t, tho' not before, for, up to that time ex.n cannot issue on the judg.t. — Upon the principle of this rule it could not be brought in C. until after 12 or 15 years, for within that period at any time ex.n may be taken out. — But it is now settled, that if, from any cause within that time Ex. cannot be had, or when the full benefit of the ex. if had cannot be obtained, then act.n will lie on judg.t

In any of these cases the stat. Westm. 2 Scire facias may be brought upon the judgment. —

Mod. 14. 62. 1 Ld. 236. 4 Bur. 2483

The judg.t must be an actual & existing judg.t at the time of the action brot; for if it has been reversed or in any way discharged the act.n does not lie.—

In an action of Debt on Judg.t no evidence is to be introduced beyond the judg.t; that is to be taken as conclusive evidence of a debt to that amount; except where the judg.t has been obtained by fraud—evidence of this may always be introduced for it goes to shew that there was no judg.t one obtained by fraud being considered as such.

Doug. 1. Str. 468.

Neither does this rule extend to a judg.t rendered in a foreign country, that being considered merely as a simple cont.t affording only prima facie evidence of a debt; an enquiry therefore, in such case may be made into the original merits.—And a judg.t will lie on such judg.t.

Doug. 4. Wilm. 540.

+Vid. 10.

By the Constitution of the U. S. full credence is to be given in each State to judg.ts rendered in another. They are not therefore considered as being foreign judgm.ts.—

+Vid. 10.

In C. a judg.t obtained agt. an alias and in debtor, with service upon the garnishee has no force agt. the absconding debtor himself; nor can an action of debt be maintained agt. him, on such judg.t. It is intended merely to draw property out of the hands of the garnishee; and is of no further efficacy than to bar the found.n for a scire facias agt. the garnishee.— In the original act.n the deft. cannot prevent the garnishee from the gar-nishee cannot appear & defend; for, if he is not a receiver, or has any other ground of defence he is to avail himself of it in the second action, viz. on the fac. fa.— And, on the fac. fa. the deft. cannot prevent the garnishee's testifying as to the fact of his having debtors, or any thing in his hands.

+By an act passed Oct. 97. garnishee is permitted to defend for his principal.

Debt.

For money due on bond or single bill, the action of debt is the only remedy. — If the money is payable by instalments, i.e. part at one day & part at another, the rule is that if it is a bond with penalty, a suit may be brought upon the first failure. but if it is a single bill or promissory note, it cannot be brought till after the last day of payment. — An act. of Ass. however might be brought on a promissory note before the last day of payment was past. —

Co. Lit. 292. b.
1 Wils. 80.
Bul. N.P. 168.
4 Black. 547.

A bond conditioned for the performance of a collateral act is viewed in Chy. as a cov.t & a specific ex.n may, in general, be obtained. But, if it is evident that the obligor was to do the act, or pay the penalty at his election, specific ex.n would not be decreed. —

2 Pow. on C. 136.
2 Atk. 371.
Str. 583.
++ Ibid. 184. * 108. + 126.

Bonds made upon an illegal consider.n are void. If the illegality appears on the face of the instrument, the Def.t can demur to it: but if it does not, he must plead the illegality in his plea, & parol proof will be admitted to prove it.

2 Ld. Raym. 432.
2 Wils. 341.

On a covenant or express promise to pay a sum certain an action of debt lies. as, on a cov.t to pay rent. &c.

Ch. 187. a.

If a covent with a penalty is given, the obligee has his election to sue for the penalty, or damages, only it appears that the covenantor was to have his election. but even, in an action on a bond, damages may be given exceeding the penalty; as, if the principal & interest amount to more than the penalty &c.

2 Pow. on C. 135 &c.
2 Burr. 388. 9.
2 Black. Rep. 1141.
2 Burr. 520. 2 Saund. 100. — Lough 44. cont.

To recover money out of the hands of an officer who has levied it, debt or indeb. ass. lies. –

#Ibid. 98. – By a Stat. in C. it is enacted that an action for neglect in a Sheriff &c. must be brot within two years. But if an officer has levied money & refuses to pay it over to the creditor, indeb. ass. lies after two years. So if the officer having neglected to collect refuses to deliver the exn. over Salk. 283. 654. will lie for it after two years; or, if he has collected, trover or indeb. ass. both lie after two years. – The Stat. limits only actions for damages for the neglect of the officer, not those which are brot to recover out of his hands the property of the creditor –

#Ibid. 120. – Upon a promise to pay the Debt of another, when the promise is without the Stat. of frauds, Debt will not lie; Assumpsit, in this case, is the one remedy, tho' the sum is certain. – If a promise is founded on a bad consideration the action of debt will not lie; tho' in many cases, a recovery may be had in Ass.t –

#Ibid. 127. –

The action of Debt has fallen into disuse in Eng. of late, owing to the abusive practice of the Deft. waging his law being admitted in this action. –

Of the Action of Detinue. –

3 Bl. Com. 152. The action of detinue lies to recover possession of a specific chattel; & is in nature of a bill in Chancery. –

On an action of detinue, the Deft. is ordered to make specific restitution or to pay a certain sum; which sum is in nature of a penalty. This action is rarely brot in Eng. or Ca. as it is one in which the Deft. may wage his law.

Trover will lie in all cases in which detinue will lie: but this rule does not hold è converso. For, detinue lies only in those cases, in which the deft. originally obtained possession of the property lawfully. The reason of this rule appears to be that according to an old principle of com. Law, a tortious taking divested the proprietor of the ownership of the thing taken; and it is essentially necessary to the support of this action that the Ply have a property in the thing demanded. But, as it has been settled in later times, that a tortious taking does not divest the owner of his property, it is presumed that the action of detinue would now lie, for the recovery of property wrongfully taken. –

In bringing this action, it is necessary, in the declar.n to identify the property for which it is brot with great precisenes. It is evident therefore, that it will no lie to recover money &c. which cannot be identified at all, unless it be contained in a bag &c. –

Of Notice & Request.—

At com. Law a request of what is due, is always necessary. In many cases however, the request may be by suit only, containing the ordinary allegation, "that the deft. has not paid tho' often requested & demanded". The allegn. need not, in C. be inserted in the declarn. unless an actual request in the case, is necessary.

1 Wils. 33. — 1 Stra. 88.

If a liability is to arise on some contingency, which is known to the obligee only, or which the obligor is presumed not to know; notice is necessary as a promise to pay the plff. so much, upon his coming into Somersetshire; notice of his having come into Somersetshire, was held to be necessary. but, it is said that if the fact may as well be in the defdt. own knowledge, as in the plffs. as if he promises to pay as much as I. S. does, no notice by the plff. is necessary.

Hob. 31.

Hob. 78.

Cro. Jac. 132.

It is also said that request is not necessary where there is a precedent debt or duty.

Ch. 131.

A more accurate general rule however is, that whenever there is an agreement to do any thing on demand & the obligor cannot discharge his tender without request, an actual demand is necessary before a suit is brought. as if the cont. be, that A. shall do certain business for B. & upon giving him information of its being done, B. agrees to pay A. so much. — here actual notice on the part of A. would be necessary. — But if the obligor can discharge himself, by tender without request, no actual request is necessary; tho' the agreement was to pay "on request". —

Hob. 31.

1 Stra. 88.

If there was no precedent debt or duty, as, in case of, mutuality awarded by arbitrators, &c. there must always be an actual request. —

181.b.

Notice and Request.—

†Ibid. 102.— On due-bills given by merchants to deliver to the holder such a sum in goods, demand must be made; not only because the merch.t cannot discharge himself without request but because the common course of business has estabished the necessity of a demand.—

For the reason last mentioned, on the score of general convenience; request must be made for payments due from public officers in their official capacity.— *Ibid. 102.—

And where actual notice or request is necessary, a special request must be averred in the declar.n; for, the general averment in all declar.ns of licet sæpius requisitus, is not sufficient.— 1 Stra. 89.

Of the Powers of Chancery relative to Contracts.

2 Pow. on C. 4. 5. No Stat. ever vested Ch.y with the power of decreeing the specific execut.n of agreem.t; but from the time of Edw. 4.th such a power has been exercised by that Ct. - Since the

Latch. 172. - great contest between Ch.y & B. R. in the reign of James 1.st this power has remained undisputed. - And now, if either the persons contracting or the subject of the cont. be

2 Pow. on C. 8. within the jurisdiction of Ch.y that Ct. will take cognisance of the cause -

2 Pow. on C. 215. Cts. of Equity will not, in general, decree the specific ex.n of cont.s respecting personal property, which lie merely

1 Ves. 447. 1 P. Wms. 570. 1 Ch.y Rep. 84. 5. in damages; because, in most cases, the damages given by

+ Vid. 184. a. 185. a. Cts. of Law, for nonperformance, are considered as an adequate compensation. - But, if when a bill is brought for the specific ex.n of a cont. to pay money, the def.t does not demur,

2 Pow. on C. 210. & object to the jurisdict.n of the Ct., that Ct. will decree a specific ex.n -

So if a contract concerns the personalty on one side,

2 Pow. on C. 219. - & the realty on the other, Ch.y will enforce ex.n of both parts. -

+ Vid. 186. Another exception, is where there is a suggestion of

2 Pow. on C. 217. Fraud in a mutual cont. or, if no fraud, if the ends of

+ Vern. 189. 201. 3 Atk. 383. substantial justice cannot be answered between the parties

2 Sw. 457. 8. but by a specific ex.n Ch.y will decree it -

Agreements made between husb.d & wife before mar-

1 Pow. on C. 444. 2. Ab. 55. - riage, will be enforced in Ch.y after marriage. - & bond

also to secure marriage settlements &c. is considered in Ch.y as an agreem.t & enforced accordingly. - Such a bond is

+ Vid. 22 - 3 - 4. now good at Law. So Ch.y will decree the perfor.ce of an

Pre. in Ch.y 90. agreem.t for a separate maintenance -

When a woman before marriage, gave a bond to her

2 P. Wms. 243. + Vid. 24. 236. intended husb.d, to convey lands to him during coverture

it was considered in Ch.y as a good agreement -

182.b.

Powers of a Ct. of Ch.y. —

1 Pow. on C. 315. 2 Ves. 371. 7 Ves. 175. — If one of two joint-obligors pays the whole sum due on the bond, Ch.y. upon petition will compel the other to reimburse him who has paid the whole; and this is his only way in Eng. to obtain relief — in C. a suit of contribution in nature of indeb. ass. lies in such case, to recover what the other obligor ought to pay. —

2 Pow. on C. 10. 14. b. 2 Bro. Ch. 341-3. — 2 P. Wms 243 cont. — It is a general rule, that Ch.y. will not interfere to decree the specific ex.n of a cont. unless it be such an one as damages may be recovered upon at Law. — as, if there be an agreement to convey land, this agreement must be such an one as would entitle the grantee to damages upon non-performance, or Ch.y. will not decree it to be specifically executed. 1 Bond. 139. 177. 359. — and in such case they will not decree performance against a purchaser for valuable consider.n & without notice. — Yet,

2 P. Wms 243. 2 Vern. 151. — 2 Pow. on C. 14. 17. — In cases where the agreement arises under the acts of the Ct. itself, or where there is in substance, a bona fide cont. or agreement, but by reason of some formal defect, a Ct. of Law cannot give damages, Ch.y. will decree a specific ex.n — So, where the remedy at law has become extinct, 10 Mod. 515. 2 Pow. on C. 254. 5. by a union of the right & the obligation, Ch.y. will enforce the cont.: as when a testator's wife is made ex.x. — Pu. in Ch. 22.

1 Ves. 250. 2 Pow. on C. 17. — But, where the reason why a Ct. of Law cannot give damages, is the not happening of events provided for by the parties, Ch.y. will not decree a performance. —

2 Pow. on C. 19. — 1 Ves. 87. — Whenever a person files a bill for the specific ex.n of a cont. he must, before he can procure a decree, show that he has performed all that he was to do on his part by the cont. or that he is ready to do it: — for, equity will not enforce performance of a cont. on one side only —

Powers of a Ct. of Chy.—

1 Ch. Ca. 302. Finch 445.— And therefore, if it has become impossible by subsequent events for the Dft. to perform his part of the cont. Chy. will not decree it agt. the opposite party—

2 Pow. on C. 22.— But where there is no default on the part of the applicant, & by reason of the non-performance on the part of the Dft. the Plf. is not in Statu quo, i.e. he will labor under disadvantages, if the cont. is not performed by the Dft.; Chy. will decree a performance—

2 Vern. 21.— Pre. in Ch. 312. Gilb. Eq. Rep. 70.— as, if the Plf. has sold part of his lands, or been subject to cost & expence, in part performing the agreement & is prevented by accident from performing the rest &c.—

1 Ves. 377 S. So, if third persons are interested in a performance, as, children under a marriage settlement they may enforce a performance in Chy. agt. either of the parties, tho' the other has failed on his part.—

2 Pow. on C. 31. 3 Br. Par. Ca. 389 & Vid. 124. So, if a Stat. be enacted after the making of a cont. rendering complete performce. unlawful, yet performce will be decreed as far as is lawful, if the parties desire it—

2 Pow. on C. 38. Chy. will always conform to the intention of the parties in the cont. & if it is apparent that their intention was to trust to the cont. itself for security of its performce they will never order further security to be given—as,

Pre. in Ch. 89. 1 Vern. 107. where A. in a marriage settlt. covenanted to leave his daughter £1000 on his death. & a bill was filed to compel A. to give security for the performce of this cont. Chy. dismissed the bill, because the cont. of A. was what the parties originally trusted to & that still remained—

5 Br. Par. Ca. 546. The principle is to carry the cont. into effect, forcibly accordg. to the intent of the parties: therefore, where a landlord covenanted to make out a lease, in general terms it was held that he was bound to do it, without insertg. restrictive clauses of an unusual nature—

2 Pow. on C. 40 & 41. 1 P. Wms. 292. 1 & 5. 2 Vern. 671. & Vid. 275 & 336. Upon the same ground, or its being the intention of the parties, in a marriage settlt. where lands are agreed to be settled on one for life, remainder to the heirs male of his body, which on a cont. executed, would give the first

Powers of a Ct. of Chy.—

5 Dunf. 299.
1 P.Wms 129.
2 Vern. 638.

taker an estate-tail; yet, on a bill brot for the exn. of such articles, Chy. will order the lands to be conveyed in strict settlemt. by which, the first taker, will have only an estate for life, with remainder to his heirs &c. according to the apparent intention of the parties.—

2 P.Wms 349.
3 Br. Par. Ca. 327.

Therefore, the words "to A. for life, remainder to his heirs, or heirs of his body" in case of executory agreemts. are always considered in Chy. as vesting a life estate in A. only, tho' the rule at law, is in manifest contradiction to the intent of the parties, that he should take a fee-simple, or fee-tail under those words.

2 Pow. on C. 56.
79. 232. 268.
2 Ves. 639.
1 P.Wms 710.
1 Salk. 154.
10 Mod. 468.
1 Fonbl. 413.
2 Vern. 280.

Whatever is agreed to be done, Chy. will consider as done, from the time of making the cont. unless some other time is fixed for performance; And, even if another time is fixed for exn., the property will be considered as already transferred, if the terms are settled & the formal part, or exn only, remains to be completed.—as, where A. agrees to purchase of B. several houses which before the time of making the conveyance, were destroyed by an earthquake, the loss was held to fall on the purchaser— In pursuance of this rule, money agreed to be laid out in lands is considered land, & land agreed to be sold for money, as money & will go to the heir or exr. accordingly.— (N.B. In the case of Stent vs. Bailis, 2 P.Wms 217. Sir Joseph Jekyll, made a decree agt. the above rule, yet the course of the authorities are clearly conformable to it.)

2 Pow. on C. 83.
1 Ves. 175. 190.
2 P.Wms 217.

Ibid. 55. 6.
2 Pow. on C.
112. 230. 240.
2 Vern. 530. 1 P.Wms
483. 172. 170.
2. 26. 221. Bro. Ch.
400. 3 Atk. 254.
1 Br. Ca. Ch. 230.
3 P.Wms 121. note C.
1 Fonbl. 413. 410.

Money directed to be laid out in land as above will pass under a devise, of all one's real estate, if this appears to be the intent of the devisor.— Yet, a person, thus, possessed of money, absolutely, or in fee-simple, may at his election consider it as real or personal estate, and may of course bequeath it by a will not attested by witnesses—

Powers of a Ct. of Chy.—

1 Fonbl. 414. 2 Vern. 530. 583. Money, thus agreed to be laid out in land, is subject to the hus.d's curtesy, but not to the wife's dower.—

1 Fonbl. 359. This rule, however, of Chy. considering, as done, what is agreed to be done, is not allowed to operate so as to shelter any fraud: Ex. gr. If vendor of land after entering into articles to convey, holds the title-deeds, it is thus enabled to sell the land a second time; this second sale, if to a bonâ fide purchaser without notice of the first, shall be binding, the articles notwithstanding.—

2 Pow. on C. 79. But, when there has been no actual contract of sale, but merely an agreem.t to make a contract in future, Chy. does not consider the property as transferred, but as belonging to the original owner; who, of course, is liable to bear all losses that happen.—

Of the power of Chy. to rescind or relieve agt. Cont.s

Tho' Chy. seldom enforces personal contracts, it as readily grants relief agt. such cont.s as agt. any other.— Contracts or agreements respecting the transferring of stock are always enforced tho' it is personal property, and Chy. will enforce specific ex.n if it respects the quantity agreed to be transferred, tho' it may have greatly risen in value since the time fixed for ex.n

Ibid. 182. a.

2 Vern. 394.

2 Pow. on C. 143. Whenever Chy. relieves agt. a cont. or sets it aside, for any cause, it does it upon the terms of restoring the parties to the situation they were in before entering into the cont.; and, if the party applying for relief has rec.d any part of the consider.n money, he must refund it.

Powers of a Ct. of Ch.y —

~~Vid. 44~~

1 Vern. 60.
2 Pow. on C. 204.7.

If a bond with a penalty is given for performance of covts; or if a penalty is inserted in a covt. to enforce performce, the party seeking a specific performce must, in his bill waive all right to the penalty. —

+ + Vid. 179.
2 Pow. on C. 130.7
2 Atk. 371.

It is no objection to Ch.y's enforcing exn of a cont. if there is a penalty provided in case of non-performance; if left the object of the agreet is damages only, —

2 Pow. on C. 204.5.
Monbl. 141.2. 387.
*Vid. 108. 179.

Relief agt penalties inserted in bonds &c. is sometimes granted by Ch.y & sometimes refused. — The rule, as generally laid down in the books, is. That, if there is any datum, by which to measure the damages occasioned by nonperformance, aside from the penalty fixed by the parties; as, in case of ordinary bonds for debt, where the sum actually due, appearing on the face of the instrum with interest, is the rule of damages, or, as in case where the debtor agreed to pay 5 per cent. interest, but if not paid by such a day, to pay 5½ — in these cases, & it would be so in all cases of debt, the Ct. will relieve. But, if there is no such datum, no relief can be obtained. —

2 Vern. 310.
2 Eq.
3 Atk. 520.
2 Mad. 112.

Mk. Suppose ~~an addition may be made to~~ some restriction should be laid upon this rule, which is, that in all cases where the covts are negative, or not to do certain acts, Ch.y according to the above rule, will in no instance relieve agt the penalty, if there is not a datum whence they may obtain a true rule of damages. but, if the covts are affirmative there are instances, in which they will relieve, tho' there be no such datum. And in such cases, as the Ct. cannot itself try facts, to ascertain the quantum of injury sustained, they will direct an issue of quant. damnificatus, to a Ct. of Law. In C. the practice of sending issues of fact to a Jury does not obtain — the Ct. try the facts themselves. —

1 Eq. 442.
Ibid. 442. —

Equity will not relieve agt an agreet, altho' from the terms of it, it seems to be in nature of a penalty, if it be not really so. —

1 Ver. Ch. 102.
6 Br. Par. Ca. 417. 470.
2 Pow. on C. 267.

When a favor is voluntarily offered by one party, the other, on certain conditions; altho' such conditions are

2 Pow. on C. 219.
1 Vern. 220. 265.

Pre. Ch. 160. 3 Atk. 520. penal in their effect, yet if they be not strictly complied with, Ch.y will afford no relief: as, where a creditor agreed to take less than his debt, if paid by a certain time; the debtor failing to pay at that time, Ch.y would not assist him. —

Ch.y will never relieve ag.st a penalty, however great, imposed by itself to compel obedience to its decrees. —

If bonds have been given for the performance of a variety of acts, for a breach of each of which an action lies at law; as, the payment of money by instalments; altho' this relates to personal property merely, Ch.y will, in order to prevent the trouble & circuity of a suit for every breach, set a penalty, which will either compel a strict performance, or be an adequate compens.n for non-perform.ce

+Vid. 182.a.

1 Vern. 189. 3. Atk. 383. articles of agreem.t between merchants, are thus treated. —

So, in general, when a controversy cannot be settled at law, without a multiplicity of suits; as, in matters of account, from which have sprung a variety of disputes, Ch.y will take up the whole controversy, & make a final settlement. — A bill, in cases of this kind is called a bill of peace. —

1 Vern. 189. 1 Atk.

185.b

Powers of a Ct. of Chancery.

2 Pow. on C. 221.
1 Br. Ch. Rep. 329.
Fonning on Mor.

Chy will sometimes refuse to decree a specific ext^n of an agreem^t. ag^t which they would not grant relief. - is in case of unreasonable cont^t. unattended with fraud. -

2 Pow. on C. 221. C. 233.
2 Vern. 71.
1 Ab. 20. 7
4 Mod. 180.
3. Atk. 383.
Pre. Ch. 539.
1 Br. Ch. 440. -

Any unfairness that has been made use of by the person applying for a specific performance of a cont., any misrepresentation or concealment of facts, tho' it be not sufficient to induce the Ct. to rescind the cont. yet it will prevent the interference in its favor. -

2 Pow. on C. 233. 2
2 Vern. 415.
1 Atk. 10. -
2 Bro. Par. Ca. 415.

A cont. must be certain & mutual, or no decree can be obtained for its specific ext^n. - But, if it be mutual at the time it is entered into, tho' the mutuality be destroyed by subsequent events, it is no objection. -

1 Ves. 74. 450.
Str. 738.
Pre. Ch. 475.

An executory cont. which is merely voluntary, is seldom enforced in Chy. - On such a cont. even if under seal, nominal damages only, can be recovered at Law; and the rule in Chy. is, that the cont. must be such an one, as will entitle the party at law, to real damages, or they will not carry it into ext^n. - But, there are exceptions to this rule.

2 Pow. on C. 242.
274 - 1 Ab. 341. -
Pre. Ch. 22.
475. 2 P. Wms.
245. 5th 9. Mod. 106.
1 Ves. 250. -

If the cont. be a reasonable one, & such an one as the Ct. upon application, would have required to be done; or if it be one founded upon justice, if the Ct. can lay hold of any consid^n whatever, they will decree its performance.

2 Ves. 238.
3 Atk. 389.

Chy will not decree the perform^ce of a cont. tending to promote extortion, oppression, or immorality. -

2 Pow. on C. 200
1 Br. Par. Ca. 27.

A party seeking the specific ext^n of an agreem^t, has himself shown backwardness in performing his part, Chy will rarely interpose in his favor; especially, if circumstances are altered by his conduct, in running his delay.

2 Pow. on C. 200.

Where a cont. has lain dormant for a long time specific ext^n will not be decreed, unless special circumstances warrant the neglect. -

1 Pow. on C. 37.
2 Pow. on C. 258.
Ves. 35 a. 3^d

Cont^s ag^t infants are sometimes enforced in Chy. the non at Law; as if an inf^t borrow money & actually expend it in a charity. - Also, when the cont. is beneficial to the inf^t. -

4 Ibid. 182. a. 2 Pow. on C. 145. 2 P. Wms. 203.

& Ct. of Chy. will in all cases relieve agt. a cont. in which there is the least tincture of fraud, whether it be in the consider.ⁿ or execution of the cont.; & whether the cont. respect real or personal concerns —

2 Pow. on C. 147. 8. 3 P. Wms. 290. Talb. Ca. 38. 40. 3 P. Wms. 129.

So, the taking an undue advantage of a man's situation & thus procuring an unreasonable cont. whether he be in necessitous & embarrassed circumstances, in a state of intoxication, or a man of weak intellects, is always considered as a ground for relief in Chy. on the principle of fraudulent intention, & improper hardship, in the person procuring the cont. — Even if the cont. be entered into under any undue influence, or under circumstances that furnish ~~evidence~~ evidence that one of the parties had an advantage over the other, it will be relieved agt. — But, if the parties are participes criminis, & criminal in an equal degree, as in case of gamesters; no relief can be had. —

10 P. Wms. 118. 4 Ibid. 130 a. 3 P. Wms. 41. 310. 2 Pow. on C. 150.

2 Pow. on C. 144. 152. 228. 1 Wils. 230 1. 2 Ves. 518. 422. 1 Br. Ch. 175.

Inadequacy of price alone, or the mere circumstance of a contract being unreasonable, if the parties are perfectly acquainted with their rights, and there is no fraud, misrepresentation, or misconduction in either of the parties it seems is no ground for relief. But it is apprehended that it may be a ground as furnishing of itself self-evident demonstration, from the nature & object of the bargain itself, of fraud, or imposition. —

7 Ibid. 117. b.

Vern. 453. 2 Br. Ch. 107. 1 Wils. 229.

And, if there are any circumstances, which the Ct. can lay hold of evincing that the cont. was not perfectly free & fair on both sides, they will relieve. —

2 Pow. on C. 150. 2. 189. 3 Atk. 194. Atk. 404.

Coercion, tho' not amounting to legal duress, is a sufficient reason for Chy. to proceed upon, in rescinding a cont. Yet a suitable degree of reverence for a parent or superior, does not come under the description of coercion, so as to render a cont. void.

2 Pow. on C. 152. 204. 1 Atk. 11. 1 Ves. 19.

Bargains originally oppressive, as well as those gained thro' fear or coercion, may, after that fear, or oppression is removed, be confirmed & thus rendered binding — but such confirmation must be made by the party when

2 Pow. on C. 103. 4. 3 P. Wms. 293. 294.

10 Vern. 348.

Powers of a Ct. of Chancery.

2 Pow. on C. 189. fully apprized of his rights, freely, & without compulsion or fraud exercised upon him by the opposite party. —

2 Pow. on C. 181.2 Vern. 5. 187. 2 Ch. 14. 2 Ves. 125. Atk. Ct. of Ch. are sometimes influenced by motives of national policy, in relieving ag. contracts, as in cases of marriage brocage cont. & bargains with young heirs for their expectancies. —

Fitz. 122. Where contracts are rendered void at law by the Stat. of frauds & perjuries, Ch. will, in some instances enforce them, as where the cont. is executed or partly executed on one side or where something has been omitted in the writing cont. by fraud or mistake &c. —

1 Pow. on Con. 194. 428. 4. 2 Pow. on Mt. 55. 2 Vern. 288. Talb. Ca. 10. Fitz. 122. 124. 2 Pow. on Con. 255. 257. In cases of implied or private trusts, where by reason of the Stat. of Frauds, no remedy can be had at law ag. the trustee, Ch. will enforce performance of the trust, if proof can be procured by confession of the trustee, by circumstantial parole testimony &c.

Fitz. 70. So, as a general rule, Ch. will enforce performance of all trusts. —

1 Ch. 12. 1 Ves. 450. 1 Br. Ca. Par. 400. Ch. it is said will decree ag. the lapse of time, i.e. if the time fixed for the perform. of a cont. is elapsed, they will notwithstanding decree it to be performed. The doctrine of the equity of redemption of mortgages depends partly upon this. But, a decree of this kind will never be made, unless there will otherwise be great injustice. —

of the power of Chancery to issue Injunctions.

*Vid. 353. An injunction to stay waste may issue from Chy. in all cases in which an action of waste will lie at law, & in many others: Ex. gr. Cts of law can never give remedy in action of waste agt one who has the legal title to land, as a trustee &c. Yet Chy will issue an injunction agt such trustee. — Chy will also issue a similar injunction agt tenant in tail after possibility of issue extinct, tho' he is not liable for waste at law. In this last case, however, Chy will not issue an injunction unless the tenant has committed very unreasonable & wanton waste. —

2. Show. 89.

An action of waste will not lie, at law, in favor of a remainderman or reversioner, if any other estate intervenes between his remainder & the particular estate in esse, of which the tenant is at the time in possession. Yet Chy will grant an injunction in favor of a remainderman thus circumstanced. So they will do it, in favor of a contingent remainderman.

3. Bl. Com. 227. 2. Sw. 83. *Vid. 354.

3. Atk. 223. Fearne. 450. *Vid. 353.

Notwithstanding, in a lease for life, the words "without impeachment of waste" are made use of, tho' this includes an action at law for waste Chy will grant an injunction agt wanton waste. —

2. Show. 89. 2. Vern. 238. Cro. Car. 242. 3. Atk. 210. 1. Salk. 161. Ambler. 107. 2. Br. Chy. 89. 3. Ev. 549. 565. 1. Wms. 528. 1. Ca. 521. 397.

188.a.

Powers of a Ct. of Chancery.

Ed. 48.6.

An injunction to stay proceedings at law, may issue either before, or after suit commenced, after verdict before judgmt., after judgt. before exn. or even after exn. is issued. This injunction lies agt. suits on all contts. which tho good at law are void in equity.

If a mortgagor covenant that he will not apply to Chy. for relief agt. a foreclosure, Chy. will grant an injunction to stay proceedings, notwithstanding the cont. & if a suit at law, is brot. on the cont. an injunct. to stay proceedings in this suit will also issue.

1. Vern. 489.

As Cts. of Chy. will relieve agt. fraud, so they will grant an injunct. on a suggestion of fraud, to stay proceedings in a Ct. of law.

Chy. will issue an injunction agt. an Executor, forbidding him to act as such, pendente lite, respecting his right to the executorship.

Injunctions in favor of authors, & agt. such as attempted to republish their works without permission, were frequent, even before the Stat. of Anne, which has more clearly defined their rights, than they were at com. law, & given them a legal redress in those cases.

Powers of Chancery.—

Cts. of Chy. in Eng. have lately issued injunctns to prevent a party from multiplying suits by repeatedly bringing actions of ejectment for the same cause.— For, as the facts upon which this action is founded in Eng. are fictitious, one action is no bar to another for the same claim; & therefore there might never be a finis litium, if there were no such interference by Chy.— In C. as the proceedings in ejectmt are not fictitious, & as one decision is a bar to a future action for the same cause, no such interference is necessary.—

7 Wd. 355.

A person holding evidences of debt, after they have been paid, but not being cancelled or delivered to the obligor, may be compelled to resign them up, by applic. to Chy.— That Ct. also has power to order evidences of title to be delivered up when it becomes proper that the holder should not retain them; as, in the case of a mortgage, when the debt secured by it is paid by the mortgagor.— In C. as deeds take effect by being recorded, the mortgagee may be compelled, on receiving payment, to reconvey.—

Chy. will order an off-set, when in justice would otherwise be done; as when a person is sued by a bankrupt, there being mutual debt & credit.—

3 Bl. Com. 436.

Chy. differs from a Ct. of law chiefly in three particulars.— 1. Its mode of obtaining evidence.— 2. Its mode of trial.— 3. In its mode of relief.—

Of Slander.

Esp. 571. 2 Sw. 43. Bull. N. P. 4.

According to the latest authorities, slanderous words are to be construed according to their ordinary acceptation. The old rules of interpreting them in *lenioriori*, & in *mitiori sensu*, are now obsolete.—

Slander is of two kinds, consisting of— 1. Words actionable in themselves— 2. Words not in themselves actionable, but becoming so, by reason of some special damage, which they occasion to the person of whom they are spoken.—

For words in themselves actionable, the plf. is to recover whether he has sustained any real damages, or not— from the malignity of the words themselves, bad consequences may probably ensue, & this a sufficient ground for a recovery.— For words not actionable in themselves no recovery can be had, but in consequence of actual damage: this is the gist of the action, & must be stated & proved.—

Esp. 491. Ca. 3 Bl. Com. 123. 2 Sw. 38.

I. Words actionable in themselves are of four kinds. 1. Such as charge a man with that, which, if true, would subject him to corporal punishment. It is observable here, that the charge being of a crime scandalous or not, is no criterion by which to determine whether they are actionable or not; for they may be actionable, tho' they do no injury to his reputation, as a charge of treason, under certain circumstances & they may also affect one's reputation materially, & yet not be actionable; as to call a man dishonest, or a liar.— the only thing we have to regard, is, whether they bring him of whom they are spoken into danger of legal punishment or, whether they import a crime punishable corporally.— Words charging a man with a crime, which if true would subject him to a fine merely, are actionable or not, as the crime charged is infamous or not.— This has been so adjudged by the superior Ct. in Q.—

4 Ved. 170. a.

3 Wils. 59. 4. Co. 16. 19. 2 Str. 782.

2. Words tending to injure a man in his trade or profession are actionable; as to call a physician a quack, a lawyer a knave, or a merchant, a bankrupt. But, to maintain an action for words of this kind, it must be in proof that the plf. obtained his living by that trade or profession; but proof of his acting in the business is enough, whether he has been admitted legally or not. —

4 Durn. 308.

1 Sid. 233. 2 Salk. 694. 1 Str. 547.

3. Words accusing a person in an office of profit, or credit, of a want of abilities or integrity, are actionable in themselves — but words of this kind must be spoken of a man in his official capacity, as to say of a Justice, that he is a dishonest man generally, is not actionable; but to say that he uttered a corrupt judgt. is actionable — A distinction is made, in Eng. between offices of profit, & those of credit or honor only: In the former case, words that impute either a want of understanding, of ability, or integrity are actionable; but in offices of credit a charge of want of ability only, are not actionable — In P. no such distinction has prevailed — A mere expression of a person's opinion relative to another, it seems is not actionable. —

Salk. 695.

2 Dw. 41.

3 Wils. 177.

Hob. 219. 4. Co. Rep. 17. a.

4. Words, which, if true, would tend to exclude a person from Society, are actionable in themselves: as to charge a person with having an infectious disease &c. — But such charge must be in the present tense; for, if it is in the past tense, "that he has had the disorder" &c. is not actionable.

2 Burn. 473. 2 Str. 1189. Ep. 425.

Ibid. 189.

Words, which if true, would subject a man to imprisonment, are now uniformly holden to be actionable, when the punishment is in the alternative, the rule is, that if he any ways possibly the fact charged might subject to an infamous punishment, the words are actionable —

1906

Slander. —

The position, "that words of heat & passion are not actionable" is not strictly true. To call one "villain, rascal &c. in a passion, is indeed not actionable; but the reason is, that these terms import no definite charge. Yet, if a person should voluntarily throw himself into a passion, & use actionable words, the excuse that he was in a heat & passion, would be no defence. If, however, one should be wantonly exasperated by provoking insults from another, & being thus provoked should use actionable words agt. his adversary, this would go greatly in mitigation of damages, & perhaps ought to be a total bar to the action. —

Bul. N. P. 8. — All words, whether actionable in themselves or not, in order to entitle the plf. to recover agt. the person speaking them, must have been spoken falsely & maliciously: and this is a necessary allegation in the declar.n & a necessary part of the plfs proof. — In case of words actionable in themselves, if the plf. proves that the deft. in fact spoke them, malice is presumed so that this turns the onus probandi on the deft. to shew either that they were true or not maliciously spoken. — 3 Burr. 1.

The legal import of the word "malice" is any wicked, corrupt, wrong or unjustifiable motive. It does not necessarily imply ill-will: for if a person should, thro' mere wantonness propagate a story of another, without any just or reasonable cause & without any necessity, it would be a ground for an action. — Bul. N. P. 10. Co. Litt. 297. It is therefore no excuse for the deft. that he heard the words from another person, if he repeated them. —

3 Burr. 1. 26. 110. Bul. N. P. 8. Ibid. — When actionable words are spoken confidentially to another person, they are not actionable unless malice be expressly proved: or if they are spoken out of a motive of friendship, & without intention to defame. —

4 Co. 16. 18. Hut. 2. 18. 2 Mod. 300. Cont. 50. 1. Rol. 48. Palm. 94. 1 Lev. 277. — The words must import a fact committed: a mere charge of bad intentions, not being a ground of action: thus adjective words or words spoken by way of conjecture or belief if they carry the idea, that the plf. is guilty of the crime charged are actionable. — Cro. Car. 38.

Cro. Jac. 91. 1. Leo. 82. 4. Co. 19. 15b. Hob. 115. 6. Durnf. 691.

It is a rule, that the whole sentence & all the words spoken, must be taken together, for though part of the words are actionable, the rest may explain them so as to render them not so - as, "J. S. is a thief, for he stole my trees" - this is not actionable, for the ~~taking~~ of trees is no theft, wherefore J. S. was charged with no crime. -

Where words are drawn from a person, by helping interrogatories, they are not actionable, this being a proof that they were not maliciously spoken. -

Cro. Jac. 90. Hob. 328.

Any thing pertinent or material to the issue may be spoken in Ct. by lawyers for their Clients, tho' it go to charge a party or witness with some crime. - But if what they say is irrelevant to the case, they are liable. -

Eff. 503. 4. Rob. 14. 1. Rol. 33.

Neither will an action lie agt. one for making a regular complaint to a grand jury, nor, agt. a witness for testifying in Ct. But in these cases, if the complaint or testimony were false & malicious, an action for malicious prosecution would lie in one case, & for perjury in the other. -

Eff. 501. 4.

II. Any words not actionable in themselves, charging one with any thing scandalous or infamous, & he thereby sustains special damage in any way, an action of slander lies to recover his damages. as to charge a person with being a liar &c. - And in this case the special damage the Pltf. has sustained must be specially stated in the declar.n. -

Bul. N.P. 7. In an action for words actionable in themselves, the plf. may give in evidence other words not actionable — The
2 Str. 47 reason assigned for such indulgence is to encrease dam
Esp. 518. ages — but this reason is founded on principles entirely false — The only rational ground for introducing evidence of this kind is to shew malice in the deft. — But the
Esp. 520. plf. cannot have other words actionable in themselves, to he may have a separate action for them — Qu. —

Bull. N.P. 2 So, if the plf. states in his declar.n any special
Esp. 520. damage, where the action is for words actionable in them-
+1 Ca. 193 b. selves he may prove that, but no other special damage —

In the declaration, it is frequently necessary to in
Cro. J. 513. — troduce an "innuendo" for the purpose of explaining the words
2 Lev. 130. spoken, or matters to which they refer — but as the office of
10 Co. 76 a. the innuendo is merely explanatory, it can never extend
Salk. 504. the meaning of the words beyond their natural import, nei
2 Ray. 1417. ther can it render their application to some particular
1 Lev. 115. person certain, when from the tenor of the words as spoken
5 Mod. 398. it is indefinite & uncertain — as, if the words are "I know one
6 Harg. 691. near or about P.N. is a thief" the innuendo cannot make
1 Rol. 85. these words refer to any particular person. — But when words
Salk. 513. are spoken of a person not by his proper name, but in some
Cro. Car. 443. character as "your father, or your brother &c. is a thief", here it
Cro. Eliz. 777. is proper to make an averment that the plf. is the father or brother of the person spoken to & that the words "your father &c." innuendo the plf. as they &c. were spoken to such a person — It is also necessary to state that the words were spoken "of & concerning the plf." unless the words were spoken to the plf. himself; in that case the meaning is obvious enough without that allegation —

Esp. 514. 575. Vent. 28. Cro. Car. 282. Cro. Eliz. 794. 1 Ld. 399.

In a declar.n for words actionable as referring to a man in his office, it is necessary to aver that the words were spoken in a colloquium or conversation respecting the plf. in his office. — So, if the words are actionable as referring to a man's trade or profession, an averment that the plf. lived by his trade, & that he exercised that trade at the time of the slander" is always necessary —

10. Co. 130. 3. Wils. 177

Where in an action for slander there are two distinct counts, one for words that are actionable, & another for such as are not, and the verdict is general for entire damages, it is bad, & judg.t must be arrested — But, if the words are all contained in one charge, tho' part may be actionable, & part not, such a verdict would be good —

Cro. Jac. 91. Esp. 517

Under the general issue in Eng. the def.t may either shew that he did not speak the words at all, or that he spoke them without malice. So, he may plead specially, if he pleases, that they were not maliciously spoken. But, if he wishes to justify, upon the ground of their being true, he must always plead this justific.n specially. — Or, he may give either of those defences in evidence, under the general issue —

Doug. 375. Stra. 1200.

Bull. N.P. —

But in eng. if the plf. proves other words than those laid in the declar.n as he may, to enhance damages, the def.t may always prove the truth of these. —

3 Lev. 248.

For words actionable in themselves, one action only can be maintained, the damages recovered in that being considered as a satisfaction for all injury that may ever arise in consequence of the words having been spoken: But for words not actionable in themselves, but becoming so by reason of special damages, it is said an action may be brt. as often as any damage is sustained in consequence of them — sed qu. vid. Esp. 519. Bul. N.P. contra —

Slander.

Accord & satisfaction is a good, Ceo, but it is said
2 Co. Rep. 90. that it must be executed, & a valuable consider.n in law.
asking pardon, was not considered as such.

1 Sid. 935. As. Stat. of limitations with regard to slander, in Eng.
is two years in C. it is thus, — It does not extend to cases
in which the special damages are the gist of the action; for
those damages may not have arisen, until after the two years
Cro. Car. 141. are expired. nor to cases of slander of title —

Flet. 192. In an action for special damages, they must be spe-
Bull. N. P. 7 Bra. 666. cially stated, & nothing can be proved, which is not thus
Cro. Jac. 213. 2 Lev. 42. — stated — qu. may not other words be proved to shew malice? —

Vid. 405. In Eng. parole slander is no crime, unless it reflect
magistrates. The Stat. in C. the deft. may be fined £10.
upon a conviction on that Stat. No actions have ever
been brot upon this Stat.

Of Libels.

Cro. 504. A Libel is Slander reduced to writing; and anything
Bull. 129. that would be Slander when spoken, is a libel when reduced to
5 Co. Rep. 125. writing; or a libel may be in pictures, effigies &c.
3. Bac. Ab. 492.

Libels are of three kinds — 1. Such as reflect upon private persons. And it has been held in a late case, that anything reduced to writing reproachful, contumelious, or tending to
2. Stra. 898. render a person ridiculous, is a libel, as well as where a crime
2 Wils. 403. is charged agt. him &c. So, any thing that will tend to dis-
Popk. 139. turb domestic tranquility in the case of a family, is a li-
Cro. 215. bel for which an action lies —
2 Burr. 980.

2. Writings which reflect upon the government or the
2 Stra. 789 administration of it, are libels; but for this no private action
2 Burr. 199. lies. (Is this species of libels recognized in this country?) —

2 Stra. 788. 3. Publications of an infamous, obscene nature, which
tend to corrupt the morals of the people are libels for which
an indictment will lie — So, publications against the established
2 Stra. 834. religion in Eng. have been held to be libels. —

A private action lies only in the first case; but every species of libels is a public offence, indictable as such; those addressed to, or concerning, private persons being considered as such, on the ground that their have a tendency by exciting the angry passions of the person injured, to occasion a breach of the peace.
5. Co. 125. Therefore, on an indictment for such a libel, the truth of it is no justification to the defdt. tho' in a private suit, the truth of the charge, as in Slander, is a justification —

A writing concerning a dead person may be a public
5 Co. 125. offence, tho' no private action lies for it. —
2 Burr. 1128.

A libel in order, either to lay a foundation for a
9 Co. 59. private suit, or a public prosecution must be published —
2 Keb. 502. and a person publishing it knowingly & maliciously is as
2 Bl. Rep. 1027. guilty as the writer —
Salk. 416.
5 Bur. 2708.

Singing or chanting it in ridicule appears to be a
5 Bur. 2686. publication. —
Moor. 12. 813.
12. Co. 35.

Libels.

2 Wils. 203. Popk. 139. Writing a letter, addressed only to the person libelled is a sufficient publication.—

1 Saund. 131. 2 Bur. 817. Cowp. 506. Any thing made use of in a proper course of legal proceedings, or any memorial or remonstrance addressed to proper persons, for the redress of grievances &c. is no libel.

2 Brownl. 151. So, if a person in a private letter expostulates with another on his vices, it is no libel, tho there is no proof of malice in such case.—

3 Durn. 428. Salk. 417. On an indictment for a libel, if the Jury find the fact of writing, composing, printing, or vending, they must find guilty.— This rule, on Eng. principles, appears just; for in these cases, the fact & the law can be severed: & the law implies the malicious intention.— In the case of reading it is otherwise; for, the reading must be malicious & the Jury must find the malice.— The libellous matter

3 Durn. 420. appearing on the record, a general verdict, ag.t the deft. on an indictm.t for a libel, is equivalent to a special verdict in other cases.—

4 Bl. Com. 151. The punisht for the offence is fine & such corporal punishm.t as the discretion of the Ct. shall impose.—

Of the action on the case for a malicious prosecution or vexatious law suit.

An action lies 1. for a malicious public prosecution 2. for a malicious civil suit called a vexatious law suit.—

1. An action on the case lies ag.t any one, who maliciously & falsely prompts a criminal prosecution, knowing it to be false.—

Salk. 15. Formerly, nothing except the loss of reputation was a ground for damages in this action.— But now, damages

1 Stra. 691. may be recovered not only for loss of reputation, but also

2 Durn. 248. for loss of liberty, or subjecting the plf. to arrest of life or liberty, or punishment, for the vexation & trouble occasioned.

2 Stra. 977 & for the expence the plf. has been subjected to, in defending himself agt. such malicious prosecution —

Bul. N.P. 14. It is essential, that the prosecution should have been both false & malicious — By false is meant, not

1 Wils. 232. merely that the suit was unfounded, but that there was no probable cause, or, in other words no rational

4 Bur. 1974. ground for suspicion — From the want of a probable

1 Durn. 544. cause, malice may be most commonly implied; but from the greatest malice, it cannot be inferred that there was no probable cause —

1 Wils. 232. An acquittal is good evidence of a want of probable

10 Mod. 209 cause, & formerly was the only evidence admissible — But now,

Doug. 205. altho' it is necessary to shew that the prosecution is at

2 Durn. 231. an end, any other evidence may be admitted, besides an acquittal, to shew that there was no probable cause —

Acquittal, however, is not conclusive, but merely

Salk. 15. presumptive evidence of the want of probable cause; & after acquittal, if an action is bro't, it is incumbent on the deft. in most cases to rebut this presumption, by shewing the existence of a probable cause — This he may do by proving that a ct. of inquiry or a grand jury, have given so much credit to the prosecution, as to bind over for trial in the one case, or, to present in the other — If this is proved by the deft. it is necessary for the plf. to shew a want of probable cause from other facts than the acquittal — To this there is one exception; If a person is prosecuted & bound over, or presented, for that which is no crime, the binding-over or presentment, afford no evidence in favor of the deft. that there was probable cause, & he must prove that fact from other quarters —

An acquittal for a defect in the original complaint

4 Durn. 247 or prosecution affords evidence of a want of probable cause as much as if there had been a trial upon the merits —

Malicious Prosecution

Conviction, if it be before a Ct. having competent jurisdiction & power to convict, is, in all cases, conclusive evidence of a probable cause.

Cro. Eliz. 134. 871. 1 Mod. 210. — It appears from the authorities, that after an acquittal the deft. can never prove a probable cause, unless there has been a crime committed by some person of the kind charged in the prosecution claimed to be malicious — but Mr. Justice Foster thinks this rule would not now be adhered to.

Cro. Eliz. 130. 1 Leon. 187. 2 Durnf. 231. — Public officers commencing prosecutions upon false information are not liable to this action. But persons giving such false information are liable. So, if the public officer should prosecute maliciously & without probable cause he would be liable. But if a magistrate grants a warrant to apprehend a person, without any regular information, this action will not lie, but the injured person's remedy is in trespass vi et armis for false imprison^t.

Cro. Eliz. 130. 2 Durnf. 225. 231. 7 Vin. 204. a

II. For a false & malicious civil suit, an action lies, & this is called an action for vexatious lawsuit. It lies,

Cro. 525. 2 Lev. 355. — 1. If it can be made to appear that a person has commenced a suit, knowing that he had no right to recover, this action lies. It must be evident however, that there was no colour of claim, & that the person who brot the suit knew there was none.

Rob. 200. 200. 1 Saund. 228.

2. Where altho' there was a just claim, yet the deft. has made an undue use of legal process, by arresting the pltff. for a much greater sum than was due, for the purpose of holding him to excessive bail, or if he has attached property to a much larger amount than was necessary, this actn. lies.

1 Sid. 424. 1 Saund. 228.

3. Where a person brings forward a suit in the name of another without any authority for so doing.

Salk. 14. March 47.

3. Wils. 302. 4. If there be good cause of action, yet if a suit is brot forward in a Ct. not having cognisance of the cause, & this fact was known to the person bringing the suit, an action agt. him will lie.—

1. Vent. 86. 5. If a person in a suit legally commenced fraudulently & maliciously obtains a Judgt. agt. the other party, this action will be supported agt. him.

1 Lev. 292.

It has been a question, whether the practice of suing debtors abroad in a manner & under circumstances, which afford no particular benefit to the creditor, but evince a malicious intention, is not actionable? The Supr. Ct. have decided that it is not, But quere de hoc, as great injury is often done in those cases, to the debtor, not only by rendering his credit suspicious, but by depriving him, as it must happen in many cases, of the benefit of the more indulgent laws of his own State, & by subjecting him to numberless other inconveniences, to which he would not be liable if called on among his friends, & near his property.—

Mr R. supposes, that if a creditor will make use of legal process, to harass & vex his debtor unnecessarily, without deriving any benefit to himself, this ct. ought to lie against him.—

St. of C. 429. A malicious prosecution, or vexatious law suit, is a public offence under our Stat. & the injured person is to recover treble damages.—

Bul. N. P. 13. In order to support this action the suit claimed to be vexatious must be ended in some way, tho it is not necessary it should have been heard & determined in favor of the Defd.

Malicious Prosecution.

Bull. N.P. 14. Doug. 205. Stra. 114. 2 Burr. 1225.

In the declaration the plf. must state at length the suit or prosecution with which he has been troubled, the proceedings upon that, & the final issue or determination of it whether by trial & acquittal, or by a nonsuit &c. he must also state, if it was a public prosecution that it was carried on or instigated by the deft. & in all cases he must state that it was falsely & maliciously, or without probable cause. —

1 Bl. R. 385. Cowp. 421. — 3 Bl. Com. 126.

When the action is for a malicious public prosecution a copy of the record of the proceedings upon that prosecution is necessary proof on the part of the plf. and it is said, that it is discretionary with the court before whom the trial was had, to grant such copy or deny it ~~as~~ their copy is absolutely necessary to the plf & without it he cannot succeed in the action, a denial of it, is, in fact deciding the cause agt. him & is clearly proceeding in the case. —

Bul. N.P. 13.

The Ct. to prove malice &c. may give in evidence what was testified on the former trial, or any circumstances that shew ~~a~~ want of probable cause, or malice in the deft. —

Stra. 691.

Mck. thinks that every thing ought to be admitted, tho' it be not immediately connected with the former suit or prosecution, to evince malice in the deft. —

The plt. may shew either the gen. issue, or a special justification, that the suit was not carried on maliciously, or that there was probable cause.

1 Stra. 74. 2 Str. 910.

The authorities are contradictory, as to whether the jury may give damages or not, in this action — Mck. thinks it ought to stand on the ground of all other cases of a like nature, & therefore that they cannot. —

Of the Action of Trover. —

Ely. 538.
2 Lev. 20.

This action of trover, is unknown to the com. law. It arose, with other actions on the case, under the Stat. Westminster 2d. 13. Edw. 1. —

Cro. Eliz. 781.
Salk. 654.
Cro. Car. 89.
Cro. Eliz. 824.

Trover was originally used to recover such property, as had been lost & found. But, it now lies to recover any personal property, capable of being identified, which has by any means come into the possession of one, to whom it does not belong: whether he acquired possession wrongfully, or whether it came into his hands by right, as in case of bailment? He makes a use of the property, different from the original design of the bailment, or refuses to deliver it up upon demand. —

Cro. Jac. 129.
Hard. 111. Salk. 130. 283. 654.
2 Burr. 708.
Cro. Eliz. 681.
Cro. Car. 89.

Personal property alone, is the subject of this action. It does not lie for real property, or chattels real &c. It will lie, however to recover choses in action, papers, & other evidences of debt. Trover lies for money, if it can be identified, & it is said that it will lie, when it can be identified only as to quantity. ved. qu.

3 Wils. 146.
5. Bur. 2827.
2 Stra. 943.
1 Ld. 204.
Cro. Eliz. 495.
10. Reb. 56.
4 Burr. 2080.
2 Bulst. 312.
2 Show. 101.
Salk. 655.
5. Bur. 2827.
2 Mod. 245.

The gist of this action is conversion: & the conversion is proved either — 1. by an unlawful taking, that being of itself a conversion — 2. by unlawful user, as where the deft. obtains the property by bailment, & makes an use of it different from the purposes of the bailment — 3. by an unlawful detainer, as, in all instances where the deft. came in possession of the property lawfully; but refuses to deliver it up upon demand. — Demand & refusal, however, are not a conversion of themselves, but only evidence of a conversion, which may be rebutted by shewing that the deft. did not know that the property belonged to the plf: — or that the deft. had a lien upon the property & therefore a right to hold it &c —

1976.

Trover

3 Bur. 1423. So, if the Jury find a special verdict that there was a demand & refusal, the Ct. cannot adjudge it a conversion —

In all cases of unlawful taking, trespass & trover are concurrent with trover.

When the taking is lawful, trespass trespass will not lie, unless the taking, tho' not forcible, was fraudulent — i.e. unless the original intention of the taker was to abuse or convert the property taken — When property is taken with such an intention the law considers, tho there is in fact no bailment; but that the fraud annuls the contract. —

xx Vid. 378.

2 Stra. 1078. A recovery by the plf. in an action of trover, vests the property in the deft. in all cases except where the property has been returned after a conversion —

6 Burr. 996. 2 Bl. Rep. 902. 2 Rol. Ab. 5. 6 Mod. 212. A returning of the property to the plf. after conversion, is no bar to the action of trover, but only goes in mitigation of damages —

1 Stra. 570. Where there has been only a partial user or conversion of property, with damage to the rest, trover lies for the whole, even after a return, to the owner, of the property, as where deft. drew liquor out of a cask, & filled it up with water, it was held to be a conversion of the whole

1 Rol. Ab. 6. Cro. Eliz. 219. Cro. Jac. 330. Salk. 143. 2 Ld. Ray. 792. 807. Trover does not lie for a mere non-feasance with respect to property, for it affords no evidence of a conversion as, if a finder of property should lose it again — or, if a common carrier should be robbed of property entrusted to him, or should lose it, the remedy agt. him, would not be in trover, but in an action on the case; his negligence affording no evidence of a conversion —

Trover.

7 Vid. 210.a.

1. Stra. 505.
3 Wils. 332.

It is not necessary for the plff in an action of trover to have had the absolute ownership of the property taken:- possession alone being a sufficient title as agt every person except the true owner; as, a finder of property may maintain trover agt any person depriving him of the property thus found.-

Bul. N. P. 33.
Latch. 214.
1 Bulst. 68.

But, possession is not necessary to support the action; a right to possession is sufficient. as, if A. delivers goods to B. to deliver to C. & B. converts them, C. may maintain trover agt him.- But, it seems a mere gift from A. to C. in that case, would not entitle C. to an action, unless he had been in actual possession.-

2 Stra. 955.

A special property is as competent to support trover as a general or absolute property, For,

1 Mod. 30. 31.
1 Rol. 4.
Cro. Eliz. 377
2 Rol. 569.

If property is taken from a bailee, he may sustain trover for it as well as the bailor, & if the bailee sues first, the bailor is ousted of his action against the trowever, tho' he still has a remedy agt the bailee - Yet, if the bailor, in this case, anticipates the bailee in suing the trowever, still, the bailee, tho ousted of his action of trover may have an action on the case, agt the wrong-doer to recover his special damage.- It is to be observed in these cases, the commencing of an action attaches to the plff whether bailor or bailee, a right of recovery, & ousts the other of his action.-

7 Vid. 94.
1 Sw. 348. 389.
7 Vid. 198.b.

Mich. supposes that the bailee ought not to be permitted to maintain trover, unless, under the circumstances of the case, he is actually liable.- But the rule is, that the bailee can maintain this action, whenever he may by possibility be liable: and as every bailee may be responsible the rule will amount to this, that the bailee may in every case maintain trover.-

Trover

++Cro. 59. 90.
1. Wils. 8.
1 Bur. 452.
2 Stra. 1187
Salk. 283.
i. H. 120.
1 Dunf. 175.
Cro. Jac. 638.

Trover may be brot not only agt. the person who actually took & converted the property in the first place, but, where the taking was unlawful, or agt. the owner's will, as in case of a theft, it will lie agt. any person into whose hands the property has come; unless the property taken is money or negotiable bills; or, unless there ~~has~~ been a sale in market-overt, or other fair transfer

+Vid. 198.a.

This action can in no case be maintained by the bailee agt. the bailor, for any injury done by the bailee to the bailor to the property bailed — The bailee's remedy is by an action on the case for his special damages. So, it is said if the bailment is a general one to the bailee, trover can never be maintained by the bailor agt. him, for any injury or conversion of the property by him: but, if the bailment be for a special purpose, & the bailee does any act amounting to a conversion, he is liable in trover —

Cro. Jac. 182.
5. Co. Rep. 14.
Cro. Eliz. 784.
2 Stra. 1187

Where there are two joint owners (as tents in common) of property, they must both join in an action of trover for that property. Therefore, one cannot maintain trover agt. the other. —

Comp. 450.

When one has a lien upon property in his possession he is not liable to trover for refusing to restore it to the owner, unless his demand is paid or tendered — As, in case of a common carrier — For the law on the subject of liens see Esp. 582. 3d.

Esp. 582. 3.

Trover —

It has been questioned whether the Stat. of limitations, barring actions of trespass after three years, does not equally apply to actions of trover for the same injuries — Tho' the Stat. does not expressly mention actions of trover, Ink. holdes, that wherever trover is concurrent with trespass, it ought to be barr'd as well as that — for it is the nature of the injury, & the dispute arising in consequence of it, that is meant to be barr'd, & not the form of the action merely. — It would seem absurd that the remedy for the same injury should be barr'd in one form of action, & not in another. — The Supr. Ct. of this State, however, have decided contrary to this opinion, upon the ground, that Stat. of limitation should be construed strictly. —

Ink. 7 Ed.

In a declar.n for trover, it is not necessary to state a demand, even in those cases where proof of a demand is necessary: for, a demand & refusal are but evidence of a conversion; & a conversion itself is always stated. —

Very great accuracy was formerly necessary in describing properly converted. But now convenient certainty is sufficient in description. A definite rule in this particular, cannot be given.

2 Stra. 809.

The general issue is almost universally pleaded to this action. It is said indeed by Holt & Wesden, that nothing except a release can be specially pleaded — But this rule appears unintelligible. The practise has been to give any defence in evidence under the general issue — But the Supr. Ct. in C. admit any special plea, as in other cases —

Eq. 592. 3.
6 Burr. 695.

Of Replevin.

C.L.B. 340. &c.
2. Quinc. 53.
3. Bl. Com. C. 13.
St. of C. 3425.
350.

Replevin in Eng. is of two kinds:- 1. that given to persons whose cattle are taken damage feasant.- 2. that allowed to a tenant, whose property is distrained by his landlord for nonpayment of rent.- The second kind is unknown to the law of Conn. & the practice of distraining for rent, which gave rise to it.-

Tidd. 412.-

1. If cattle are found damage feasant (i.e. doing damage) upon the lands of any person, the owner of the land, may, at his election, bring trespass for the damage done, or distrain & impound the cattle; and when impounded, they are held as a security for the payment of all the damages they have done.- The owner of the cattle however has a writ of replevin, may obtain the restoration of his cattle. This writ is to be procured of any magistrate competent to the issuing of other writs, & upon procuring it, the plff. must give sufficient security, by a bondsman, to answer all damages.

2 Sw. 89.-

This bond stands in place of the cattle that were impounded, as a security to the distrainor, for the damages he has sustained.-

Upon this writ of Replevin, trial is had, & if it is found that the deft, the original distrainor, had a right to impound them, judgt. is rendered in his favor, for all the damages he has sustained. & if the execution on this judg. is not satisfied, the bondsman will become liable, and the the body of the plff. should be taken to satisfy it, on his death or discharge, the bondsman will be liable.- In Eng. the cattle that were impounded, must be restored to satisfy this judgt. upon, & they are the first property liable upon the exn.- (But in C. the bond coming in lieu of the property replevied, that property, by the replevin, absolutely vests in the replevisor & is not liable to be restored to the deft, in case, he obtains judgt.-

3. Bl. Com. 147.

St. of C. 345. — By Stat. in C. the owner of the cattle, upon
2 Sw. 89. notice given him of their being impounded, must replevy or redeem them, on penalty of incurring a daily forfeiture —

On the trial that succeeds the writ of Replevin, if it is found that the deft. had no right to impound the cattle, the replevin becomes an action of trespass vi et armis, in which the plf. recovers damages for the unjust taking. — Generally, however, the design of the plf. in replevin, is not to recover damages; but he appears for the purpose of having the defts' damages assessed.

As the plf. in a writ of Replevin, may state the damage he has sustained by the taking of his cattle at what sum he pleases, if he states it so as to bring it within the jurisdiction of a justice of peace; & upon the trial, it turns out that the defts' damage amounts to a greater sum than the Justice can render judg.t for, he must dismiss the whole cause; & in this case the plfs' bondsman becomes immediately liable. —

2 Sw. 89. The owner of cattle distrained, is bound to maintain them, on receiving notification that they are impounded, & this notific.n the distrainor is bound to give. —

If the owner of cattle impounded is not known, the party impounding, ~~must~~ support them, & the expence of their keeping must be added to the damages. —

In C. Stray cattle taken damage feasant, must be sold, & the surplus, after payment of damages & costs, belongs to the town treasury. The law is the same respecting estrays found not damage feasant. —

Fl. & Co. — As the body of a debtor imprisoned is holden as a pledge; so are cattle impounded: In neither case is the

debt or damage discharged by the death or escape of the pledge. In these & many other respects, there is a great same tarity between the holding of cattle impounded, & of a debtor imprisoned. In both cases while the pledge is holden, no other remedy can be had. The pl. may by agreement with the def. discharge the latter & then take his pro. but a discharge without such agreement is a discharge of the debt.

The hound-keeper like the gaoler is liable for escapes whether voluntary or negligent, but there is this difference the hound-keeper may retake whether the escape of the cattle was negligent or voluntary.

2. Sw. 90.1. 4 Ved. 359. If cattle leap a fence not legally good, & afterwards do damage to the lands belonging to the owner of the fence he is not entitled to any damages; for if he had kept a legal fence he probably would not have sustained any. But if the fence is partly good & partly bad & the beasts over the good part, they may be impounded & the owner of the fence will recover his damages.

When cattle enter an inclosure from the highway, it is immaterial at com. law whether the fence was good or bad; because it is unlawful to permit cattle to go at large in the highway. But in C. certain kinds of cattle such as cows, sheep, &c. are commonable: And with respect to them the law is the same, when they enter an inclosure from the highway as when they enter from a neighbours field. But with respect to other cattle or those not commonable, entering from the highway, the rules of the com. law prevail & they are liable to be impounded whether the fence were good or not.

In C. however there is a Stat. enacting that any town may in townmeeting, make any other cattle common.

able in such town: And the regul.s prescribed by the town, in such cases, are rendered binding, & must be strictly pursued. —

A man finding cattle upon his lands may turn them out or drive them out with a little dog: If they are lost in consequence of this, he is not liable, unless he has been guilty of some malice wantonness or neglect with regard to them — but generally, if he turns them out so that they may go from whence they came, he will be justified. —

3. Bl. Com. 5. 145. 5. a. 2. For the law relative to the Eng. writ of replevin, where goods have been distrained for rent — See Black. Com. —

3. In C. there is still another species of replevin in use, which bears a strict resemblance to that in Eng. for rent — This is that writ of replevin, which lies by a debtor to secure property, that has been attached to respond a Judg.t — This writ of replevin however, the debtor is never obliged to resort to, as he is when his cattle have been taken damage feasant. —

2 Sw. 89 - 92.

Replevin, however, upon an attachm.t in C. is never an adversary suit — It's only design is, to restore to the debtor his property which has been attached, upon his finding sufficient security to respond the Judg.t —

The Justice of Peace, who takes replevin-bonds as he acts in a ministerial capacity, is liable if he takes insufficient bonds. —

It has been made a question, whether the party's own bond might be taken on a replevin, & it has been determined in the Ct. of Errors that it could not — Or at least

that the Justice himself would in such a case be liable on failure of the pl. in replevin. —

It has also been questioned, whether if property of less value than the amount of the demand has been attached, the bondsman is liable for the whole damages, or only to the amount of the property attached & replevied. From analogy to the cases of bail, & of bonds of indemnity, it

4 Dunf. 433 clearly appears that the bondsman would be liable, only to the amount of the property attached. For, it is an undisputed rule of law, that the duty of a bondsman is discharged in his putting the opposite party in a situation as good as he would have been in, if bonds had not been given. Difficulty however, arises from the words of the Stat. which enacts, That the bondsman in replevin, shall be bound to answer, the whole debt &c. which may be recovered. — No adjudications have been had, in our Cts upon this question. —

Another question depending upon the same principles as the last is this, whether property replevied, can be surrendered by the bondsman in discharge of his bond? This is also, undecided. —

If the property of one person has by mistake or otherwise been attached for the debt of another, the proper remedy is not by replevin but by an action of trespass. For our replevin is never an adversary suit. —

Ch. 352. The general issue in replevin is non cepit that the deft. did not take the cattle as complained of. — In all

P. 353. 4 other cases, the deft. must avow, i.e. he confesses the taking but justifies his right so to do. And this avowry, is considered as a declar.ⁿ on the part of the deft. demanding damages for the injury he has sustained for the cattle. —

Of the action of False Imprisonment.

Any unlawful detention or restraint or confinement of the person of another, or any violation of every man's right of loco-motion, is false imprisonment, for which the injured person may obtain redress in an action of trespass vi et armis.

Eff. 320. A detention of a person whether in a prison, or private house, or in the stocks, or street, is an imprisonment.

Certain persons are by law exempted from arrests: as, Ex.rs & Adm.rs as such are not liable to be arrested. Other persons are freed from arrests under certain temporary circumstances: as, parties & witnesses in a cause depending in Ct., are not liable to arrests, while going to, attending, or returning from Ct. A distinction is made

Doug. 120. between these two classes. Where, the freedom from arrests

3 Wils. 368. is connected with the character in which the person acts, as in the first case, an arrest would be false imprisonment; but in Eng. in the case of persons privileged only un-

1 Co. 52. 2 Bl. Rep. 1190. der certain circumstances, as suitors at Ct. &c. if they are arrested, no action for false imprison. lies, but a writ of Supersedeas will issue from the Ct. to discharge them.

It has been questioned, whether an action for false imprison. will lie in C. by a person who having a writ of protection from a Ct., has been arrested. According to

Doug. 545. the reason of the Eng. rule, it would seem that an action in this case would clearly lie: for a protection is sufficient evidence to the officer, of an exemption from arrests; & the reason why it is not false imprison. in Eng. to arrest a suitor going to Ct. is, that he has no evidence to offer to the officer, to prove that he is exempted from ar-

Cro. Jac. 379 rests; but if a Supersedeas has been once obtained, & an arrest is made, it is false imprison. And it is observable that a protection in C. is virtually the same as a Supersedeas

deas in Eng. – In both of these cases, however, the arresting of a person, before he has shewn the evidence of his exemption, is not false imprisn. tho' detaining him afterwards is. –

2 Lw. 111. 1 Dunf. 265. 2 Lw. 38. 110. 286. 2 Bac. 267. Cowp. 1. 9. – 2 Bl. Rep. 823.

An arrest on Sunday, in civil cases is void. – It has been doubted when an arrest, or illegal detention is made use of, on Sunday, for the purpose of securing a subsequent arrest, whether the latter will be void or valid. – To consider it as valid, would encourage breaches of the law. But this point is not fully settled.

Saik. 625.

Bail may take their principal on Sunday. –

5 Co. 91 b.

Whether a levy on property, made by illegally breaking doors &c. is good, has also been questioned. According to the old authorities, it would seem that such a levy is good. – But a decision reported by Cowper seems to recognize the opposite doctrine, as being the law at present. Cowp. 1.

Cro. Eliz. 328. Moor. 457. Lev. 329. Hob. 330.

If an officer, by mistake arrests B. instead of C. he is liable to an action for false imprisonment. And in Eng. it seems the consequence would be the same, if B. in this case, affirmed to the officer that he was C. – It is hoped that this last rule would not be adopted in Con. –

False Imprisonment.

The most common cases of false imprisn.t are those which take place under a void authority —

2 Sw. 96. 97.

A Ct. of record, acting within its proper jurisdiction, is not liable for any mistake of judg.t however palpable. — But such a Ct. if it transgresses the limits of its authority, may be called to an account, & is liable to an action of false imprisn.t like any private person —

Salk. 396.
2 Bl. Rep. 1035.
114. Stra. 710.

A Court, however, of general jurisdiction, are never liable, unless they have acted from malicious & corrupt motives. — And if any judge acting in a judicial capacity, is guilty of corrupt practices, or conducts maliciously, it is the prevailing opinion, that in C. he is, like any other individual, liable to prosecution even tho' he does not exceed the bounds of his jurisdict.n — The Eng. law, on this head, appears to be unsettled —

2 Dirn. 231.
7 Ves. 195. 6.

In Eng. a Ct. not of record, is liable even for mistakes of judgment. — But the severity of the com. law, in this particular, has been somewhat mitigated by several Stat.s —

Stra. 710.
1 Wils. 153.

The Ct. of a Justice of peace is, in C. a Ct. of record — and no person acting in a judicial capacity is here liable for a mere mistake in judging. — The Eng. distinction between Cts. of record & those not of record, is not recognized by the laws of C. —

Commissioners on the estate of a person deceased, are not a Ct. of record in C. —

If a corporation, punish a breach of their bye-laws by imprisonment, not having power so to do, it is false imprisonment.

5 Co. 8 a.

False Imprisonment.

The Plff. or person who obtains a warrant or process from a Ct. not having jurisdiction, is always liable, & if the process is irregular, or illegal, & the deft. is arrested upon it, it is false imprisonment in the person so obtaining the illegal process. — So, if an attorney procures an illegal arrest to be made, or indeed if any person is the immediate or immediate cause of an illegal arrest, they are liable in false imprisonment; for, as this is an action of trespass, there can be no accessaries, but all are principals, & liable as such —

2 Wils. 47.
2 Stra. 993.
3. Wils. 308.
2 Bl. Rep. 1055.
Cowp. 101. 425.

So if a warrant is filled up improperly, an action for false impris^t. lies ag^t. the person who filled it up: & also ag^t. the officer who served it, if he knew the fact: —

2 Wils. 47.

Of the liability of the Officer to an action for false impris^t.

If an officer arrests upon a warrant from the face of which it appears, that the Ct. from whence it issued, had no power to grant it, he is liable to an action for false imprisonment; as is also the Plff. & the Ct. who issued the warrant.

2. Sw. 387.

But if the warrant is such that it is uncertain from the face of it, whether the Ct. had jurisdiction or not, as in Ca. an Ex^tion from a Justice of peace for £10 but from what appears in the warrant, the Ct. might have had jurisdiction: it is clearly settled in Ca. that the officer obeying it is not liable; for, he is to presume

that the Ct. has done right. & it is not imposed upon him as a duty to search the records of the Ct. & see whether it be a fact that the warrant issued rightfully or not: it is enough for him, that it might have been properly issued:- Yet, if in this case it be eventually found, that the Court had no jurisdiction, the Ct & the Ofr. are liable.

2 Burr. 231.
Ep. 330.
Ibid. 215.

Whether an officer is liable for arresting on a warrant, which, tho' void, does not appear necessarily to be so, is an unsettled question in the Eng. law. In Co. Rep. it is laid down as clear law, that the officer in such case is liable. But the authorities there quoted do not support the position - And that authority is at least shaken, by later decisions - Tho' there is one case which seems to recognise it for law.

10. Rep. 70. 76.
6 Mo. 391. 412.
Sp. Ray. 229
2 Stra. 993.
2 Burr. 633. 4.
2 Wils. 352.

Proceedings under a judgt. rendered by a competent jurisdiction are legal, tho' afterwards reversed, & no action lies agt. the officer or Ofr. in such case -

2 Burr. 231.

Whenever an officer is sued & wishes to justify on the ground of having had a warrant exr. &c. to execute, he must produce the warrant, exr. &c. unless it is by law out of his hands: and if it is returnable to any Ct. he must show that it has been returned.

1 Wils. 17.
2 Stra. 1184.

So, if the Ofr. is sued for false imprisonmt. he must produce the judgment.

Salk. 408.
P. Co. 52. -

So, if a justice of peace is sued he must shew that the imprisonment was legal, & ordered by him while in the execution of his office -

Moor. 247, 740.

False Imprisonment.

Of Search-Warrants.

2 Wils. 275. General search warrants are illegal — A search-
Id. 359. warrant to be legal must be directed agt. a particular
Esp. 398-9. person, & to a particular place. Before it can be obtained the person applying for it must make oath of the felony committed & that he vehemently suspects him of certain person, & certain place, stating the grounds of his suspicion. If upon a search warrant the stolen goods are not found the party searching is liable in trespass, for he is justified or not by the event.

2 Aug. 345. A person may sometimes justify an arrest & im-
Esp. 334. prisonment without a warrant; as, if an atrocious felony be committed, any person may arrest the offender & detain him, until proper authority can be had.

Stra. 509. 993. If this action is brot agt. several, & they plead
1 Wils. 17.
Id. 210. 211. a. not guilty, jointly, if one is found guilty, they must all be found so.

2 Ray. 329. False imprisnt. is a continuing injury, & damages are recoverable only up to the date of the writ — If the imprisnt. is continued after that, a new action lies.

Of the action of trespass for Assault & Battery. –

The lowest species of injury to a man's person, for which an action lies, is for menaces or threatening, by which a man is detained from pursuing his business, or put to trouble & expence in guarding his person or property. – But the menaces must be such as might affect a man of ordinary firmness or the action cannot be maintained. – The remedy in this instance is, strictly speaking, by an action on the case, & not by trespass vi et armis. –

An Action also lies for an Assault, which is an attempt or offer to strike a person – any gesture or action, implying an intent to do personal injury to another may constitute an assault. – But what would otherwise be an assault may be explained to be none, by words at the time, which clearly shew that it is not intended for an assault, as if a man lay his hand upon his sword & draw it, but at the same time says "if it were not a proper time, I would not take such language" this is not an assault.

Battery is an actual striking or touching the person of another in a rude, insolent, or angry manner. Pulling a man one or throwing any thing on him, is also a battery. Every battery includes an assault, it is therefore commonly called an assault & battery. –

A Maiming is the same as a battery only in a greater degree & to constitute this the person injured must have been deprived of some member necessary for his defence as an eye, a tooth, a finger &c. –

It is not necessary, to constitute a battery that the act be the immediate act of the deft. for if it is done by him, tho' the intervention of some intermediate instrument or agent, it will be a battery. –

Cro. J. 312.

1 Hawk. P.C. 133

1 Mod. 3.

Cro. J. 312.

2 Bl. Rep. 892.
3 Wils. 403.
3 Bul. N.P. 6.

Assault & Battery.

Esp. 313. Where a person receives an injury in consequence of an act to which he consented he can sustain no action for it;—as where two persons agreed to play at cudgels.— But it seems that if the act which was consented to was unlawful there an action lies, notwithstanding the consent.— Mr. thinks this distinction between lawful & unlawful acts unfounded,— & thinks it analogous to cases of contracts where the parties are in pari delicto, & that the maxim, volenti non fit injuria ought to be applied.—

Hob. 138. 1 Mod. 405. Sack. 6. 37. Wid. 210. a. According to some authorities, the injury must be committed wilfully or maliciously, in order to lay the foundation for an action of assault & battery— According to others, such intention is not necessary.— The true distinction appears to be this: If a person is doing that which he had no right to do, or, in doing a lawful act, is guilty of any wanton negligence, & a battery or other injury ensues, trespass vi et armis will lie, tho' there was no intention to do an injury— But, if a person is pursuing lawful business, & uses common prudence, & an unintentional injury arises he is not liable.—

A Battery may frequently, be justified: as,

1 Hawk. P.C. 130. 2 Stra. 1049. Bul. N.P. 19. 10. If an officer in arresting a man, should commit a battery upon him, it would be justifiable; but this justification would go no farther than to "molliter manus imposuit, unless there was resistance & a refusal to be taken when a battery may be justified, & in some cases even a wounding.

6 H. 314. 2 Ray. 62. 1 Salk. 407. 4 Ed. 5 Ca. So a parent & child, a husband & wife, a master & servant may justify a battery in defence of each other; tho' whether a master may in defence of a servant seems to be a question.

2 Salk. 641. So, if any person attempts unlawfully to enter the house or inclosure of another, if this is done forcibly it will be a sufficient justific: for a battery by the owner: But if such intrusion be peaceably & without force, the deft. cannot justify a battery, without a request to do so.

1 Hawk. P.C. 130. 3 Bac. Ab. 508*. So, a battery may be justified to defend, personal property: But after it is actually taken away, tho' it be done unlawfully, the true owner may not make use of force to retake it;* however he can retake it without force he may do it.

*qu. in case of felony 2 Sw. 593.

Bul. N.P. 18. 2 Salk. 642. 12 Ray. 177. It is always a justific: for the deft. that the ltf. beat, or even assaulted him first; for a battery is always justifiable in self-defence. This is what is called son assault demesne. But there must be some proportion between the battery given & the first assault, i.e. if the deft. has made use of much greater force, & has beaten the ltf. much more than was necessary, it is no justification for him to say, that the ltf. struck first: tho' even in that case this would go in mitiga. of damages.

Cro. Jac. 366. In Eng. a person assaulted in a church-yard is not allowed to defend himself.

Assault & Battery.

Fitz. 44.b. 50.a. A parent or master has a right to use moderate chastisement to a child or servant — so, a schoolmaster may correct a scholar moderately. These, therefore, are justifications

Cro. Jac. 308. Generally, whenever the plff. has been the cause of the battery or it has proceeded from his own fault, it will be a justifica. to the deft. —

Salk. 542. The plff. in an action of assault & battery may give

Stra. 81. many things in evidence which are themselves grounds of action as, in an action for a battery to himself, he may prove that

+ qu. must not these acts be stated in the declar. to render such evidence admissible? Esh. 417. Sid. 225.

the deft. beat his wife at the same time, tho' a separate action lies for that. The reason given for this indulgence, in the books, is, to aggravate the damages: — the true reason is, to show the atrociousness of the battery, the outrage & high handed violence which has been done: for, if the deft. at the same time that he beat the plff. also beat his wife & children, as this makes the whole transaction more outrageous and atrocious, it is a reason why the plff. himself ought to recover greater damages. —

When the deft. pleads "an assault demesne", if the plff. means to deny it, he must do it under a replication of de injuria sua propria, absque tali causa — this is the technical traverse to a plea of "an assault demesne" — "that the battery arose from the deft's own wrong, without any such cause as alleged by him in his plea" —

Com. Dig. 288. If the plff. means to confess that he assaulted the deft. but wishes to justify that assault he must always plead his justifica. specially.

Bul. N.P. 17. Fitz. 24.a. In Eng. if the deft. wishes to justify the battery, he must plead his justification specially — he may however, give in evidence under the general issue, that the battery was accidental — In C. either may be given in evidence under the gen. issue —

Cro. Eliz. 208. & Vid. 211.a. The justification must be as broad as the charge: as, if the plt. has stated a battery & wounding; it will not do for the deft. to say that he was an officer & took the plt. by a warrant; for, this is no justific.n for a wounding: he must therefore go on & state resistance in the plt. which will justify wounding him.—

Salk. 11. A former recovery is a complete bar to an action for assault & battery, & any consequential damages that the plt. has sustained are no grounds for another action.

In assault & battery, & every other action of trespass vi et armis, where there are joint-trespassers, each one is liable for the whole damages, & all or any one may be sued at the option of the plf. But a recovery agt. one is a bar to any action agt. the others, & that too, whether the judgt. has been satisfied or not. For, in torts, a judgt. alone, is a bar; but, in contracts, the judgt. to be a bar, must have been satisfied. The reason of this is, that in torts, the damages are uncertain, the plt. if not bound by the first judgt. would, in many cases, be induced not to take out exn. but sue another trespasser, & see if he could not recover more. In contracts the sum demanded being certain, no such reason can induce the plt. to multiply suits. And as the first deft. may be unable to satisfy the judgt. recovered agt. him, the rule is established that satisfaction alone shall be a bar; the law presuming, that the plf. will never bring a second suit, if he can obtain satisfaction from the first.—

Yelv. 10. 68. Cro. Eliz. 30. Upon the same principle that every trespass is in its nature joint & several, a release to one is a release to all.

Dob. 55. The Stat. of Limitations, which in Eng. is four years, in U. three, is a good bar.—

Assault & Battery. -

Every assault & Battery is a breach of the peace, & therefore the deft. is liable to two actions: one by the party injured, for his damages; the other at the suit of the public, for the violation of the law. And this last is not sustained upon the ground of the alarm occasioned by the breach of the peace, as is generally supposed but for the violation of the law; for, the action equally lies, whether the assault were public or private, tho' in the last case, there could be no alarm. -

1 Stra. 58. Sid. 325. The plf. in the private suit, cannot give in evidence the conviction of the deft. in the public suit.

Ld. Raym. 170. 1 Barnes. 100. In an action for a Mayhem, after the jury have brought in their verdict for the plf. the Court, may upon inspection of the wound &c. encrease the damages.

Of the Action of Trespass vi et Armis, generally.

Cro. Eliz. 380.

Trespass vi et armis is an action which lies for an immediate injury caused by some unlawful act; which injury may be to the real or personal property, or to the person* of the plf. — Trespass on the case, lies for an injury consequential on some unlawful act or omission. — And when the action is stated to be "on the case" if the injury turns out to be immediate, it is not good. — Qu. Would it be ill on a general demurrer?

Tid. 358.
Tid. 203 a. 206 a.
1 Stra. 638.
2 Wils. 359.
3 Bl. 403.
2 Bl. Rep. 892.
5 Burr. 848.
Tid. 53.

8 Co. 146.
Cro. Jac. 147.
1 Burr. 12.
2 Sw. 64.

An act which in the beginning is lawful, may, by subsequent unlawful conduct, become a tresp. ab initio — as if a person should enter into a tavern, which is a lawful act; yet if he should steal any thing there afterwards, it would make him a trespasser ab initio. — So, if an officer enters a house to execute a warrant & after he has entered legally does any unlawful act, it makes the whole transaction a tresp.

1 Salk. 88.
8 Rep. 146.

Trespass vi et armis does not lie for a mere non-feasance, it always supposes some act done, some misfeasance; as, if an officer should attach goods and then upon a settlement between the parties should refuse to deliver them up, he would not be liable in tresp. — So, if a man, after entering a tavern should refuse to pay for the wine he had had it would not make him a trespasser.

2 Mod. 602.

Where an officer attaches property & neglects to return the writ, he is held to be a trespasser. Tho' this appears to contravene the rule above laid down, as it is a mere non-feasance, yet it will be found that it does not; for, this goes upon the ground, that the officer, in fact, had no authority to take the property, it being a rule that an officer can never justify under a writ

3 Lev. 20.
Salk. 408.
8 Co. 52.

which has not been returned.

3. Lev. 37. — It is said the act causing an injury, must be voluntary, or trespass will not lie. See Bag. 200.b.
Ibid. 200.b.

Cro. Ja. 383. 402. 3. — As to property & possession being necessary &c. to
4. Dunf. 490. — sustain this action see Bag. 198.a. in Lower, the law
Ibid. 198.a. being the same.

Ibid. 21.a. — Trespass is in its nature joint & several, & where there are several trespassers, an action may be brought ag^t. any one or all.

1 Lev. 121. — So, in trespass, there are no accessories, but all
2 Salk. 409. are principals: i.e. an action lies ag^t. all who aid, a-
2 Bl. Rep. 1055. bet, or countenance a trespass, tho' they do not the act,
8 Co. 159. themselves. So, if one has received the benefits of it, ag^t. it was committed, he becomes a trespasser.

Ed. 399. — A lunatic is liable civiliter for trespasses that he com-
Crob. 134. mits. But he is in no case liable criminaliter. Qu. as to the principle on which he is liable civiliter. Would it not be more just to subject his property & not himself?

Cro. J. 405. 6. — The declaration, in an action of trespass for
4. Bur. 2455. injury to personal property, must describe the property
3. Co. 38. with convenient certainty; an ownership or possession
2 Ld. Ray. 1410. must also be stated in the dec^n, & the value of the
Cro. Jac. 40. property, tho' no good reason appears for this requisite.
2. Lev. 156.
2 Lev. 430.

It seems necessary in Eng. that the trespass should be
Cro. Jac. 443. stated to be contra pacem dom. regis, & to have been done
2 Salk. 636. vi et armis. The reason on which this rule was founded
has long since ceased, and in C. those allegations are held not to
2 Sw. 99 con.^a be necessary in a declar^n.

Trespass vi et armis.

Co. Lit. 283. a.
Co. Eliz. 32.

The plf. in this action, is not confined, in proving facts, to the time stated in his declar.ⁿ, but may prove the facts stated, at any time, within the Stat. of Limit.ⁿ And, as the defence must be as broad as the declar.ⁿ it must in these cases, cover all the time within the Stat.

Neither is he confined, in his proof, to the place stated in the declar.ⁿ, the action being transitory.

1 Durn. 274.
4. Ib. 347.
5. Bac. 191.

Formerly, it was in no instance, allowed the plf. to join in one declar.ⁿ immediate injuries, & those which were consequential, or in other words, trespass vi et armis, & trespass on the case: But it now seems to be permitted so far as to suffer the plf. under the general clause of alia enormia, to prove consequential damages, which he has sustained, from the trespass for which the action is brought. As, in an action of trespass, quare clausum fregit, he is permitted to prove that the deft. debauched his daughter. There however, appears to be some confusion in the books, concerning the precise limits to which a plf. will be suffered to go. There has been one decision in C. which fully recognized the right of the plf. to join these two causes of action in the same declar.ⁿ.

Ibid. 225.

5. Durn. 651.

All causes of action, arising ex delicto, whether the remedy be by an action of trespass, or case, are several, & one of several who are liable, may be sued alone.

211. a.

Trespass vi et armis.–

In an action of trespass ag.t Several, if they are all found guilty, or, in any case where more than one is found guilty, the Jury must not sever the Damages, & find more ag.t one, than another; for, each is liable for the whole damages. And a Verdict in which the Damages are Severed, is bad & the def. if he pleases, may arrest the judgment: but, he is not obliged to do this; he may take out ex.n de melioribus damnis, i.e. for the Sum found ag.t one of the Defts. & this ex.n goes ag.t all. Ex. gr. A. Jun. B. C. & D. in trespass; the Jury find ag.t B. £10. ag.t C. £20. & ag.t D. £30. This Verdict is ill, & judg.t may be arrested by the def. but, if he pleases, he may take out ex.n for the £30. & this ex.n goes ag.t B. C. & D. tho' that Sum was found ag.t D. only – the Defts. in such a case can never arrest the judg.t nor the def. takes out ex.n de melior. dam. he must release the others. –

Bul. N. P. 26.
5. Bur. 2790.
1 Stra. 422.
Carth. 19.
Vid. 210. a.
Cro. Car. 118. 11 Co. 5.
Cro. Eliz. 420. –
Stra. 810. 1140.

The above rule, however, seems to apply only where the def.ts. plead jointly. Sed. qu. –

Vid. 205. b.
3. Burr. 377.

If the Defts. plead any matter of defence joint if one of them is found guilty, or if the defence is found to be bad as to one it is also for both. –

Vid. 208. a.
300.
Cro. Eliz. 411. Co. Lit. 282.

In Eng. a justification to this action must be pleaded. Matters of excuse, as that the trespass was accidental &c. may be given in ~~evi~~ evidence under the gen.l issue. In C. both may be given in evidence –

Vid. 208. b.
Cro. Eliz. 208.

Justification must be coextensive with the declar.n

3. Burr. 297.
3. Wils. 26.

One which goes to the gist of the action is considered as being so, tho' it does not answer every charge in the decl.n

Of Trespass on the Case.

3. Bl. Com. 123. 208.
2 Bl. Reb. 862.
2 Wils. 359.
3. Ib. 403.
4. Bur. 2092.
Pohn. 161.
3. Lev. 37.

The true distinction between the cases where Trespass vi et armis, & those where Trespass on the case are the proper actions appears to be this. The former lies only where the act is unlawful, & the injury immediate – the latter is sustained, where the injury arises in consequence of the unlawful act, & also, in many cases, where a lawful act is attended with injurious consequences to another person; as, if a person

2d Ray. 1402.
Str. 334. 635.

by digging in his own land, which is a lawful act, diverts a water-course, from his neighbours land trespass on the case lies agt. him. –

It is said, there is a distinction between actions on the case, & actions of trespass on the case, but the distinction is not clearly pointed out. –

Cro. Eliz. 598.

The action of trespass on the case lies, not only where damage has been sustained, in consequence of some act of the deft., but it is the proper action for a redress of injuries that have been sustained, by reason of some culpable neglect or omission on the part of the deft. –

Cro. Eliz. 219.

But, this omission, or nonfeasance must be of some act imposed upon the deft. as a duty by law.

Cro. Jac. 440.
2. Lev. 72.
1 Salk. 12.

It is no excuse for the deft. to say, that the plt. by a sufficient degree of care & attention might have avoided the injury he has sustained, as, if the deft. had thrown logs in the highway, & the plt. had fallen over them & thus received an injury, it will be no defence for the deft. to say, that the plt. by due care might have avoided them; for here the act of putting the logs there, was unlawful, & the deft. by that act made himself responsible for all subsequent injuries that might be sustained in consequence of it. –

2 Lev. 195.

But, if the injury has arisen merely from the plt's own neglect or folly, he will not be entitled to a recovery. –

211. c.

Trespass on the case – Rescue –

2 P. Ray. 214. 2 Wils. 359. If a person undertakes to perform business in the line of his profession, & does not perform it faithfully or skilfully he is liable in this action – As if a Surgeon undertakes to cure a wound & does not do it skilfully, or if an attorney undertakes to manage a cause, & does it unfaithfully they will both be liable in this action. – But if the business undertaker was not the regular employment of the undertaker, no action will lie for want of skill, unless upon an express promise. –

Foch. 188.

2 Stra. 1064. This is the proper action to be brot ag.t a master for the misfeasance of his servant. –

Vid. 52. b. It is also the proper action for a master, ag.t a person who has enticed away his servant. – But it seems if a penalty is agreed upon between the master & servant to be forfeited by the latter, on his forsaking the former, a recovery of the penalty is a bar to an action ag.t the entice

3. Bur. 1345. 2. Bl. Rep. 387.

Trespass on the case is the proper action to be brought ag.t a rescuer for a Rescue – This is the forcibly freeing a person from an arrest, or imprisonment and an action may be brot ag.t the rescuer, either by the officer in whose custody the prisoner was when rescued or by the original plf. at whose suit he was arrested. –

If the prisoner was under an arrest upon mesne process the rescue is a complete discharge of all liability in the officer to the plf. But it is not so on an ex.n for there it is said he might have had the body com. latus –

6. Mod. 211. In an action ag.t the rescuer by the original plf. before he can recover he must prove 1. the original cause of act.n ag.t the person rescued. 2. The writ or mesne under which he was arrested. 3. A legal arrest by the officer – And if the plf. can prove that the person rescued is unable to pay the debt or that by means of the rescue he has been deprived of all means of recovering his debt, it will greatly enhance the damages

Str. 657.

C. Mod. 211. Ib. 242. b. And it is to be remarked, that if the plf. recovers ag.t the rescuers the whole debt due from the person rescued, it is a bar to an action ag.t him. But if the whole sum is not recovered, it is considered as being given only as a recompense for the delay & trouble occasioned to the plf. by the rescue, & is not a bar even pro tanto ag.t the person rescued. —

The cases in which this action will lie are almost infinite; for an enumeration of them see Epp. 681. to 687. —

Bul. N. P. 78. Salk. 20. It will lie for special injury arising from a detention of the plfs property & will be no bar to an action of trover or detinue for the same —

Cro. Eliz. 194. In the declar.n the whole case, tho' the circumstances should be particularly stated —

2 Show. 81. When the action is ag.t a common carrier, it is not necessary to state, that any particular sum was tendered to him for his wages. —

1 Stra. 5. Cro. Car. 499. In case for diverting a watercourse, it should be stated that it is an ancient watercourse, & it ought to appear that the plf. has a right to it, not by grant, by immemorial prescription — In C. a watercourse can not be held by immemorial prescription, tho' it is usual to state it to be ancient —

Cowp. 454. In trespass on the case, the day stated in the declar.n is not material and as the stat. of limitn. does not generally attach itself upon this action, proof of the fact within any reasonable time will be sufficient —

2 Stra. 8 vo. Bul. N. P. 78. The general issue is not guilty, & under it the deft. may, in Eng. give in evidence, even a complicat justific.n

On the Action for Adultery.

Cro. Eliz. 342. The form of the action for Adultery, is hefi fals vi et armis, but it is in substance clearly an action on the case, since the consequential damages arising from the seduction of the husb. wife, are the grounds of recovery.

2. Burr. 753. So, for the same reason, the Stat. of Limitations, applicable to actions of hef fals vi et armis, does not apply to this.

2. Bl. Rep. 855. Neither does the Stat. which restrains the pl. to no more damages than costs when the costs are under forty shillings.

Cro. Eliz. 31. In this action, actual proof of a marriage in fact must be had. Proof of cohabitation, & reputation of a marriage, which is sufficient in ordinary cases, will not be sufficient.

1. Burr. 205. Bul. & P. 2. 28.

Cro. Eliz. 343. Many circumstances may be proved in this action to enhance the damages: as that the husb. is a man of rank & character, the defdt. is a man of property. That the wife of the pl. sustained a good character before that transaction, & that the defdt. had intercourse with her husb. will aggravate the damages.

Bul. & P. 2. 27. So, the defdt. may give many things in mitigation of damages: as that the husb. encouraged his addresses to her or at least connived at them; that he lived unhappily with her before; & that she had had criminal connection with others before she had with the defdt. but it seems the general reputation of her being a prostitute can not be admitted.

Bul. & P. 2. 27. 4. Burrow. 2515. The only justification the defdt. can make use of, is the consent of the husb. & there seems to be a difference in the authorities, whether this shall go as a complete bar to the action, or only in mitig.n of damages. It is observable that this consent is given to an unlawful act, and according to a former rule, consent in fact is a bar, no justification.

Fitz. 200. b.

5. Burrow. 357. 1. Bur. 542. A husb. cannot maintain an action for adultery committed with his wife, after a separation under articles.

Of the Writ of Mandamus.

Ch. Pl. &c. 3. Bl. Com. 110 — This is a Writ issuing from the Superior Cts. of a State, directed to some inferior officer or corporate body, requiring them a performance of their duties — It resembles the decree of a Ct. of Eqy. in this, that it enforces specific performance of a duty: But it never lies to enforce contracts &c. of a more private nature between individuals. —

Ch. Pl. 1. 2. 3. 4. The Ct. will grant this writ generally, to compel any public officer, or any corporate body, to do their duties. — But it will not lie where adequate remedy can be had by an ordinary action before a Ct. of Law. — It will lie in one instance to compel the payment of money, that is agt. the Treasurer of a County, but it is admitted in this case, because there is no adequate remedy at Law a county not being liable, except in particular instances by Stat. —

Doug. 205. 25. Ly. 259. 1. R. 390. 1 Br. Rep. 99. Pun. Dawns. 108 — 2 Bur. 799.

Ch. 2. 99. 6 Q. 6 & 7 Ge. To obtain a mandamus, the party injured makes a complaint to the Ct. upon oath, stating the injury he has sustained — this application is wholly ex parte, & is not served upon the complainee — Upon this complaint a mandamus issues to the complainee directing him to do the act which the complaint states him to have neglected to do, or return to the Ct. within a stated time a sufficient reason for not doing it. If neither the act is done, nor a return made, it is a contempt of the Ct. & attachment will issue. — If a return is made which is insufficient the applicant will demur to it, but the Ct. find it to be insufficient, they will grant a peremptory mandamus, commanding the act to be done, at all events —

Ch. 585. &c. If the return, on the face of it is sufficient, at com. law, it was satisfactory, & no peremptory mandamus could issue, even tho' it was false; the remedy being by private action agt. the officer for such false return. But by the Stat. 9. Ge. 2. when a return is made, it may be traversed & if on trial, it is found to be false, a peremptory mandamus will issue, & the applicant will recover judg. for

his damages & costs.- & failure of compliance with a mandamus, in every stage of the proceedings is a contempt of Ct. & punishable by attachment.-

3 Bul. N.P. 201. Ep. 687. Whenever a mandamus is issued to a corporation, or a number of persons, that are willing to comply, tho' the majority refuse so to do, the attachment will go agt. those only, who have refused to comply, or at least those only, will be imprisoned upon it.-

1 Sw. 99. In E. there is no Stat. on this subject, but our Cts. have adopted the method established by the Stat. of Anne.

Of the Writ of Prohibition:-

3 Bl. Com. 111-114.- The writ of prohibition is issued by Superior Cts. to inferior, to prevent the latter from deciding causes out of their jurisdiction. It also issues where the inferior Ct. is proceeding in a cause within their jurisdiction, but by rules unknown to the law.- It may issue in vacation time from judges of Com. law Cts. as well as from Ch.T.—

There is a Stat. in E. recognizing this Writ.-

It issues on a suggestion by the Deft. of the proceedings in the inferior Ct. & of the want of jurisdiction.- The mode of obtaining it, is, by procuring a rule to shew cause, why &c. and this rule is served on the opposite party, & the inferior Ct.-

If the suggestion is sufficient a prohibition is granted. If insufficient it is not granted. —

To declare in prohibition, is to file a declaration agt. the opposite party, & inferior Ct., on a fiction, not traversable, that a prohibition has issued & been disobeyed. And in this case, if it is found that a prohibition would be proper, the judgt. of the Ct is quod prohibetur fiat. If, on the contrary it is found that no prohibition ought to be granted, a writ of consultation is awarded. — This is a writ directing the inferior Ct. to proceed, notwithstanding a former prohibition, real or fictitious: and which issues, whenever upon deliberation the Supr. Ct. find the reasons offered for a prohibition, insufficient. —

Of the Writ of Habeas Corpus.

1. Bl. Com. 135. 3. H. 120. &c. This writ as it now stands is regulated by a Stat. Car. 2d. which has not been adopted in C. tho' its principles would probably be applied by our Cts. if considered as reasonable. —

This writ also issues from the Supr. Cts.; & its design is to liberate a person improperly kept in confinement; whether that confinement be in a gaol or elsewhere. If a person in confinement, is denied bail, this is the proper method to obtain it. — On a confinement for felony or treason, or upon an execution, or conviction, Habeas corpus does not lie, unless as the case may be the ct.

Habeas Corpus. –

is satisfied, or upon a conviction, the time of imprisonment is expired. – So, if a person is confined in an improper place, this writ lies. –

2 Stra. 982
1 Bur. 600.
3. Id. 1434.
4. Id. 1991.

It also lies whenever a person is confined, out of prison & without legal process, & in this case a writ may be sued out by a stranger. – Children may have this writ agt. parents, for confinement or restraint, which they suppose to be abusive. So it lies in favor of a wife agt. her husband, under similar circumstances. –

The writ is directed to the gaoler or person confining, commanding him to bring to Ct. the person confined, together with the cause of his detention. –

When the prisoner is brot into Ct., if there is no cause for his confinement, he is discharged; if there is cause for it, but he is entitled to bail, he will be bailed; or, if he is highly confined, & it is not a bailable case, he will be remanded. –

Disobedience to the order, or writ of habeas corpus is a contempt, & is punished, not as in ordinary cases of contempt, with imprisonment till compliance, but at the pleasure of the Ct. –

A Habeas corpus ad testificandum, is a writ directed to a Gaoler to bring up a prisoner into Ct. for the purpose of testifying. – It was formerly doubted whether, if this order was complied with, & the prisoner carried out of the limits of the gaol, it was not an escape; And, in the reign of Will. 3. it was determined by 7 judges agt. 5. that it was an escape. But, from the subsequent practice in Eng. it seems that a Stat. has authorized this practice. In C. we have no Stat. to this effect, but the practice constantly prevails & is never considered as an escape. –

Of Proceedings in Courts.—

I. The first stage of a suit commences with the writ & declaration; which in C. are joined.— In Eng. if a bill is taken off the file & lost, the Ct will permit the plf. to publish it from an attested copy taken by himself.—

3. Durn. 4th D.

II. Dilatory Pleas, which are of three kinds:— 1. Pleas to the jurisdiction of the Ct. These in Eng. are signed by the party, & not by his counsel; because it has been supposed that a signing by counsel amounted to an implied acknowledgement of jurisdiction. In C. however, these pleas, as well as others, are signed by counsel.— 2. Pleas to the incapacity of the plf.— 3. Pleas in abatement. These pleas go only to that part of the record which constitutes the writ. The writ in C. comprehends that part of the declar.ⁿ which precedes the statement of the facts.— The date & signing are common to the writ & declar.ⁿ & are therefore proper objects of a plea in abatement.— Many causes of abatement, however, are dehors the record; as, insufficient notice, filling up by an improper person, another suit pending, insuff.ᵗ service &c.—

3. Bl. Com. 301.

III. Pleas to the Action. These are of three kinds:— 1. Demurrer to the declar.ⁿ— 2. The General Issue.— 3. Pleas in bar.— A plea in bar admits an original cause of action, but not necessarily an original right of recovery.— The replication may, 1. demur to; 2. traverse the plea; 3. avoid it by alledging new matter, in nature of a plea in bar, & so toties quoties.—

Of Pleas and Pleadings. —

Barn. Not. 190. 1. A Plea to the jurisdiction must in Eng.
Vid. 4. Bac. Ab. be signed by the Deft. himself. —
32 &c.

If a person is sued coram non judice, he may have an action on the case ag.t the plf. to recover his cost & special damages also, if the plf. knew that the Ct. had no jurisdict.n: But if the plf. in the first suit was ignorant of the want of jurisdict.n the deft. can recover his costs only. —

In C. when a person is sued before a Ct. not having jurisdict.n, it is customary for that very Ct. to allow the deft. his costs. This allowance of costs is made to prevent a law-suit, & usually answers that purpose, but it is in reality no bar to another action by the deft. — In those cases where the action is dismissed ex officio by the Ct. it is not the practise thus to allow costs, but there seems to be but little reason for the distinction. —

Vid. 203 If a Ct. exceeds its jurisdiction when its limits are clearly defined, the judge is liable to an
T. Durn. 412 action by the party aggrieved. But if the question of jurisdiction is not clearly settled, he is not in this case liable. —

Raym. 34. After imparlance, a plea to the jurisdict. will not be received. —

2. Of Pleas in Abatement. —

A plea in Abatement being a dilatory plea a judg.t upon it, in favor of the deft. is no bar to a subsequent suit by the plf. for the same cause. The Judg.t on a plea in abatem.t if for the deft. is "that the writ abate"; if for the plf. "quod respondeat ouster", that the deft. answer over. —

After a *respondeas ouster* is awarded, no second
4. Bac. 39. plea of abatem.t can, at com. law, be received, except
5 Durn. 681. in cases, where it would be error to render judg.t in
3. H. 82, 687. any stage of the proceedings: As if feme covert be sued
Salk. 400. without her husband; or, an infant be sued & plead without his guardian.— In such cases, abatem.t may be pleaded in any stage of the suit.—

6. Durn. 766. Matter of abatement must be pleaded in abatement. It is not good in arrest of judg.t.—

Carth. 8—9. The deft. cannot plead at the same time, two causes of abatem.t of the same kind; as, two excommunications &c. for this is duplicity. But if there
Wms. 225 a. are several causes of abatem.t of different kinds, they may all be pleaded at once.—

Wms. 391.— After a judg.t that the writ abate, & amendm.t by leave of Ct. the writ is itself in C. considered as a new one, & of course, the deft. is allowed to plead other pleas in abatem.t.— But, when the def. once begins to amend he may rectify all amendable defects.—

Yelv. 112. The Deft. cannot plead in abatem.t after one imparlance i.e. adjournment or continuance of the cause unless from day to day, except in cases, where it would be error in the Ct. to render judg.t, as, if feme covert be sued alone; and, in cases, where the cause of abatem.t has arisen after the first imparlance.— And in this last case, it must be pleaded as soon as possible.—

By Stat. in C. all pleas of abatem.t must be plead & tried before the impanelling of the Jury. The impossibility of observing this Stat. has caused it to be entirely disregarded.—

5. Durn. 487. The least inaccuracy or mistake in a plea of
3. Ze. 186. abatem.t is fatal to it.—

Pleas and Pleadings. — Abatement. —

When a plea of abatem.t rests on a fact which is disputed, & issue being joined, is submitted to the jury, if a verdict is found for the plf. in Eng. judg.t is not respondeat ouster, but in chief, no farther trial being had upon the merits. — In C. it is the practice to put such issues to the Ct. & judg.t is not rendered in chief but respondeat ouster. —

2. Show. 42. 6. Mod. 240.

2. Ar. 204.

When a cause of abatem.t is pleaded, & judg.t rendered upon it, a writ of error will always lie from that judg.t. But if the cause of abatem.t is not pleaded no writ of error lies, unless the cause is such, as in law, entirely exempted the deft. from being sued or disabled the plf. from bringing any suit: as, if an infant or feme covert is sued alone. —

Ibid. 27. 39.

If one of several defts. pleads in abatement, & the rest, some other plea, & the plea in abatem.t is found sufficient, the writ abates as to all the defts. — The consequence is the same, if one of the defts. pleads a release & succeeds.

2. Rol. 020. 8.

Of Amendment of Writs after Abatement. —

By the Stat. of jeofailes in Eng. it is always allowable to amend a misstatement & state the truth if that will render the plf's writ good. — Ex. gr. If the Sheriff returns a writ as served on the 4th of May, wh. in order to make the service good, it should have been served on the 1st. — here, if it was actually served on the 1st the return may be amended; But, if, in this case the service was on the 4th it cannot be amended. — For a writ shall not be made good by the insertion of a falsehood. — Upon an amendm. the plf. must always pay the deft. his cost. —

St. of Q. 23.

By Stat. in C. any fact of the writ, declar.n or pleadings, may be amended under direction of the Ct. —

The causes of abatem.t are the following.

1. Disability of the plf. which may arise from

4 Bac. Ab. 35. 1. Outlawry which disables the party from bringing any suit in his own right, unless it be to reverse the outlawry. but he may maintain suits in another's

2 Ed. right.t 2. Excommunication in Eng. disables the person to sue but it must be pleaded in abatement or not at all – Neither this or outlawry, is a cause of abatem.t in C. they are not known to the law. –

Co. Lit. 128. 3. Alienage of the plf. is a cause of abatem.t, but

2 Ray. 282. cm.

2. Stra. 1082. if it is a personal action, he must be shewn to be

7. Rep. an alien enemy; i.e. belonging to a country at war with the one in which he sues. This plea may also be taken advantage of in bar of the suit as

Gilb. 4. C.P. 205. well as in abatem.t – 4. Popish Recusancy. Unknown to the laws of C. –

4. Bac. 30 5. Any privilege of the deft. either not to be sued at all, or only in some particular Ct. &c. may be plead in abatem.t when he is sued in contempt of such privilege

2. Stra. 818. 6. Misnomer of person or place of abode. When

10. Mod. 208. the deft. pleads this in abatem.t, he must always

5. Durn. 487. furnish the plf. with matter to make his writ good, that is, the deft. must state his true name or place of abode – If the deft. is misnamed, he is not obliged to plead the misnomer in abatem.t, but may suffer the suit to proceed, & say upon the judg.t And if he is sued again, by his true name, for the same cause, he may discharge himself by proving all these facts to the Ct. – If one person is by mistake sued for another, he may disregard the process, & run the risque of proving that he is not the real debtor. –

Pleas & Pleadings. — Abatement. —

4. Durn. 612. In action on Note, misnomer may be given in evidence under the gen.l issue of non assumpsit. for the instrument, shown in evidence does not support the declar.n — (vide infra.) —

In Eng. the trade, or addition of the deft. must be inserted in the declar.n by Stat. 1. Hen. 5. — In C. when a person sues, or is sued in his official character, or when his character or office, is the inducement to the action, such character or office must be annexed to his name. —

7. In C. a variance between an instrument de-
Ved. 224.a. clared upon, & the description of it in the declar.n is matter of abatem.t — It may be taken advantage of to the jury as insuff.t evidence, or by objecting to its admission in evidence as being irrelevant. — In Eng. it works a nonsuit. —

8. By the Com. law, the death of either of the parties abated the suit. — But now by Stat. both in Eng. & C.
T. Bac. 40. in case of a personal action brot by two plfs. or ag.t two defts, the suit does not abate by the death of one, if the cause of action is of such a nature, as to survive in the respective cases to or ag.t the surviving partner in the action, as in the case of co-partners &c. But in real actions, the old rule still holds, & the death of one of the plfs or defts causes an abatem. In C. it has been adjudged, that one tenant in common or coparcener might maintain an action without joining his co-tenant, & it would be reasonable to extend the rule by analogy, so as to avoid an abatem.t of the suit by the death of one of them. — In such case where the suit does survive, the death of the dec.d is entered upon the record, & the cause goes on in the name of the other. —

Co. Eliz. 3.rd Saltk. 106. 9. Leo. 5.th Where there is but one plf. & he dies, the Ex.r may have his name entered upon the record, & the suit thus proceed, if it is ~~a case~~ an action which would have survived to the ex.r

in case no suit had been instituted by the dec^d. — and this is the case with all actions upon contracts, & also with those actions upon torts, where the property of the plf has been injured by the tort for which the suit is brot. In those actions therefore that are merely brot for presumptive damages, such as slander, assault & battery &c. as they would not have survived to the Ex^r had no suit been brot, so they are abated by the death of the plf. —

+Vid. 73.b.

When there is but one deft. & he dies, the rule is the same; if the action would have survived ag^t the Ex^r he must enter, & the suit proceed ag^t him — if he will not enter voluntarily, he may be compelled to do it, by sciri facias. — Generally in all actions upon contracts, the suit will not abate, as they survive ag^t the ex^r; but where on the face of the cont. it is evident the deft. has rec^d no consider^n & his recompence lay in some act not yet done, so that his assets have never been in the least benefited by the cont. it does not survive, & consequently abates; as is the case of an officers receiving an ex^n to collect, if he is sued upon his receipt & dies before judg^t the suit abates. — In torts, the rule is, if the assets of the deft. have been benefited by the tort for which he is sued, the action will survive ag^t his ex^r & does not abate by his death. —

+Vid. 73.a.

Co. Elz. 37th. Latch. 165. 9. Reb. 8th.

9. If a feme sole plf. marries pendente lite, it is cause of abatement. — If she be deft. the suit does not abate, & ex^n may go ag^t her only. — If a feme covert is sued alone it is a cause of abatem^t or a ground for a writ of error. — If she sues alone, deft. may take advantage of it by way of abatem^t only. —

Sho. 811.

+Vid. 28.b. 29.a.

3. Dum. 531.

10. If a debt is due to or from several, & one only sues, or is sued, the deft. may plead this matter in abatem^t but cannot take advantage of it in any subsequent stage of the proceedings. —

5. Bur. 2611.

Pleas and Pleadings.— Abatement.—

4. Bac. 48.

11. That two Suits are pending for the same demand is a good plea in abatem.t to the second suit.— But both must be of the same kind, or, at least, concurrent, or it is no cause of abatem.t & they must both have the same object in view.— Therefore a writ of trover may abate a writ of trespass if they are both for the same act: but, if the ply after having brot one action finds it to be a wrong one he may bring another which will not be abated on account of the pendency of the former.—

5. Co. Rep. 61.

The Supr. Ct. in C. have determined that when the first suit is wholly ineffectual (as, if the property attached to respond the judg.t is of no value, or does not belong to the deft.) a second action ejusdem generis may be commenced pending the first.— Mr. R. supposes the principle to be, that a second suit may be commenced pending the first, whenever the second would not be vexatious.—

12. If the writ has not been duly authenticated, duly served &c. precisely according to the requisites of the Stat. it may be abated.—

2. Lev. 197.—

13. Whenever it appears from the writ & decl.n that it was not time to sue, the writ may be abated, as if in an action on a Note, the writ is dated 1st. of May & the Note does not become due, untill the 1st. of June—

If real property is attached in C. to respond a judg.t a copy of the attach.t is directed to be left at the town clerks office. But as this is required for the security of purchasers, a default in this particular cannot be pleaded in abatem.t— In ~~such~~ case of such default, however, a sale by deft is valid.—

Of Demurrer. —

Hob. 81. Lucas 353. Carth. 31.

The operation of a demurrer is to admit the truth of the facts stated in the plea &c. which is demurred to; but, admitting them to be true, it denies their efficacy, to entitle the person pleading them, to a recovery. —

Hob. 50.

It admits, however, those facts only, which are regularly stated or pleaded, & not such as are not allowed to be proved. Indeed the insertion of such facts may itself be a good cause of demurrer: As if, to an action on Note, the Deft. should plead a parole agreem.t to contravene it; the plf. might demur, because, if such a parole agreem.t actually existed, it could never be proved to bar a recovery on the Note.

Neither does a demurrer admit the truth of any thing impertinent to the cause or point in question. —

Demurrers are of two kinds, general, & special. —

Show. 242.

A general demurrer is proper where the declar.n or plea, is totally void of substance, & no recovery can ever be had upon it, admitting every thing stated to be true; And, if such a demurrer prevails when made to a declar.n no new action for the same cause can ever be sustained. —

4. Bac. 133.

Or, if an essential & material allegation is omitted to be stated, a general demurrer is proper to take advantage of such defect; but, in this case, a new declar.n containing this allegn. may be brot. & will be good: — As, in an action for Slander, if the words are not stated to be maliciously spoken. —

10. Co. 88.

A special demurrer lies exclusively, when the defect is a want of legal accuracy & precision in the statement of facts. Ex. gr. Where the law, as in most cases, requires the manner of performance &c. to be stated & it is not done; as, if in bleading a former sut. for the same cause in bar, the deft. should only state that the plf. had sued him before, without stating the manner, the Ct. before which he was sued &c. it would be bad upon special demurrer. —

Under a special demurrer, however advantage may be taken of all defects, whether defects of form, or of substance. A general dem.^n reaches defects of substance only. - (Laying a venue, in transitory actions, is merely matter of form, even in Eng. - Qu. Is a venue in such cases necessary at all in C.?) -

2 Durnf. 30. -

- A demurrer may be used in any stage of the proceedings, and whenever it is used, whether by the plf. or deft. it reaches back in its oper.^n to the first defect, whether that defect be in the declar.^n or any of the pleadings. Ex. gr. A. sues B upon a bad declar.^n B. pleads a bad plea; A demurs to the plea; this demurrer reaches back to his own defective declar.^n & is in effect a demurrer to that. And in such case the judg.^t must be that the plea in bar is sufficient, for, altho' it is faulty, it is a suff.^t answer to the bad declar.^n -

The Judgm.^t upon a demurrer is in chief, & goes of course for the whole sum laid in the declar.^n, if it is for the plf. - But the Deft in such case, in Eng. by motion to the Ct. may have a Jury of inquiry to ascertain the real damages. - In C. the Ct. exercise this office themselves, without the intervention of any Jury. - Even in Eng. when the damages are certain, or ascertainable by computation, the Ct. do it themselves, without any jury. - If a plea in bar is adjudged insuff.^t a jury of enquiry is called, in Eng. -

3 Bl. Com. 397.

Of Demurrer to Evidence. —

Co. Lit. 72. 5. Co. 104. Doug. 211-214. 222-4 — 2. Sw. 255. &c.

A Demurrer to evidence is of the same nature with every other demurrer. It is filed by taking in writing the evidence adduced by the opposite party, upon the trial, & admitting its truth, but denying that such evidence supports the declar.^n or plea which it was intended to do, & that therefore, the party adducing it, is not entitled to a recovery. — The effect of a demurrer to evidence, is to take the consideration of it from the Jury & put it to the Ct. & its operation is the same as that of a Special Verdict. —

Cro. Car. 143.

Cro. Eliz. 752. 2. Sw. 257. + Has not our Sup.^r Ct. decided ag.^t this rule? —

+ If the evidence demurred to, is written evidence, the party adducing it may be compelled to join in the demurrer. But, if it is parole, a joinder in the demurrer cannot be compelled, as it may always be pretended that the evidence is not truly stated. —

Doug. 127-9. 132-4. Cockridge v. Fanshaw.

A demurrer to evidence admits the truth of all facts, which upon the evidence stated, might have been found by the jury, in favor of him who offers it. —

Of Bills of Exceptions. —

Bills of Exceptions may be filed, when in any stage of the proceedings, the Ct. gives an opinion, which does not appear upon the record, & which the party ag.^t whom it is given, supposes to be erroneous. — This bill of exceptions is the found.^n of a writ of error. — It must be filed & tendered, within 24 hours after the cause of exception occurs, unless the Ct grant further time. — It is signed by the Ch. Justice, who, tho' not bound to sign such a bill as the party may chuse, is obliged to sign such an one, as in the opinion of the Ct. comports with the truth of facts. —

Of Writs of Error. —

Vid. 39. A writ of Error can be brot only in cases, where there is a judgt. of Ct. on some point of law appearing upon the face of the record. — (Note, a bill of exceptions becomes a part of the record.) —

No writ of error can be taken untill there is a final judgmt.; tho' after final judgt. rendered, a writ of error may be brot upon any interlocutory judgmt. — The reason of this rule is, that before final judgt. there is a possibility, that the party agt. whom the interlocutory judgt. is rendered, may recover. It has been decided in C. that an agreemt. between the parties, shall not supersede this rule. —

A writ of error will operate as a supersedeas to all proceedings in the Ct. in which judgt. has been rendered, & upon that judgt.; if at the time of taking the writ of error, a sufficient bond is given to indemnify the deft. in error, agt. all loss which he may sustain in consequence of the stay of proceedings. — Without such a bond, proceedings will not be stayed. — At com. law, a writ of error is a supersedeas under certain qualifications. —

* This is the rule established in C. under our Stat. (vid. St. of C. 182.) Notwithstand. the words of that Stat. Mak. Sub. how a writ of error may be brot without a bond, but it is no supersed.

Vid. 73. b. 2. Bac. 210. —

If exn. has been taken out upon the judgt. before error is brot, & is in an officer's hands the writ of error will not operate as a supersedeas, unless the officer is also served with a copy of it. —

If exn. has been executed by taking the body or goods of the unsuccessful party below the taking of a writ of error, tho' a bond is given, does not release the debtor from gaol, nor entitle him to his goods, &c. if sold & perhaps not if not sold. — Authorities are contradictory with regard to the effect of a writ of error with bond, when the exn. has begun to be executed. —

2 Sw. 277. 178.

Cro. Eliz. 597. 1 Dum. 730. — Talk. 322.

Cro. Jac. 240. If an erroneous judg.t is executed on land before reversal, the land is, on reversal, restored to the pl. in error, unless the land has been transferred to a bonâ fide purchaser: If the land has been thus transferred before reversal, the pl. in error has a remedy in damages only, & the purchaser is quieted in his possession —

Cases exemplifying the effect of an affirmance or reversal of judg.t upon a writ of error. —

2. Sw. 279. A. vs B. — 1. Judgment below for A. to recover of B. £20 debt & £10. Costs — This judg.t is reversed before A. has recovered any part of his ex.n — The judg.t is, that judg.t below be reversed, & that B. recover of A. £10. the amount of the cost incurred by B. in the Ct. below, but no cost in the Court in error, for none is ever allowed. — 2. deft. instead of demurring pleads to issue, & after verdict ag.t him, moves in arrest, & on judg.t ag.t him brings error & prevails he is not even allowed his cost below. This is a rule both in Eng. & C. —

2. The case as before, except that A. had collected his money, viz. £20 Debt & £10. Costs — Judg.t of reversal as before, & that B. recover £40, viz. the £30 paid to A. on the erroneous judg.t & also £10 cost which B. ought to have recovered in the Ct. below. —

3. Judg.t below as before — affirmed in Ct. above. In this case, no judg.t is rendered, but a judg.t of affirmance with cost to A. the deft. in Error, & the judg.t in the Ct. below is again operative. —

4. When the judg.t which has been reversed, is one that does not determine the merits of the case, the plf. must enter his cause for trial again, in order that judg.t may be had upon the merits, — If the Ct. in which the reversal is had, is one not competent to try facts, as the Exchequer Chamber in Eng. & Ct. of Errors in C. the cause must be remitted back to a Ct. that is capable of trying facts, as B. R. or C. B. in Eng. & Sup.r or County Ct. in C. — If the reversal is had in a Ct. competent to try facts, as Sup.r Ct. in C. the cause ~~must~~ must be entered for trial there; however small the demand may be — Suppose the judg.t below was in favor of B. the deft. in the original suit. — A. by writ of error reverses that judg.t & recovers only a judg.t of reversal, & enters the cause for trial. On final judg.t he recovers his whole costs before & after reversal, except the costs of the suit in error. And if A. had paid B. his costs on the judg.t below, he would also have recovered that on the final judg.t —

5. When a suit is remanded to an inferior Ct. for trial, the deft. pleads what plea he chooses, except that he cannot plead the same defence upon which the error was taken. —

6. Demurrer to declar.ª — The declar.ª adjudged sufficient — Error brot by B. — judg.t below reversed — Here it would be absurd for A. to enter, for, if judg.t in error is right, his declar.ª is insuff.t —

7. Declar.ª in Ct. below adjudged insufficient — Judg.t reversed above — Here A. enters, for, he has a good declar.ª — the cause of complaint has not been tried, for the Ct. above has rendered only a judg.t of reversal & not a recovery in chief as the Ct. below would have done if they had rendered the same judg.t — For the Ct. above cannot after judg.t in chief, ascertain the damages —

8. Plea in bar demurred to, & adjudged suff.t — Judg.t reversed: The plea being thus adj.d insuff.t the plf. must enter his cause for trial. —

9. Plea in bar adj.d below insuff.t — On error brot adj.d suff.t — Plf in original suit, if he enters, must enter to no purpose, — Deft. does not wish to enter, for there is nothing ag.t him. —

10. Judg.t below that the writ abate. — Judg.t reversed — Plf. must enter. —

11. If error is brot for the admission or rejection of a witness below, original Plf. may enter whether he is, Plf. or deft. in error. —

Pleas & Pleadings. – Writs of Error.

When judg.t is rendered for deft. in error he recovers his costs; the judg.t in error operating, as to defts costs as a judg.t below, in his favor would have operated. – If judg.t is rendered for plf. in error, he recovers his costs in the former suit; but not those incurred by the suit in error; if he was deft; and if he was plf. in the original suit he enters his cause for trial if the Ct. is competent to try facts. And, in such case, on final judg.t he will recover all his costs, except those of the suit in error. —

Tho there be no error apparent on the record yet if there is an error in fact, i.e. where by reason of some fact not apparent any judg.t by the Ct. would be erroneous (as, if a feme covert sue, or be sued alone) a species of writ of error may be brot in a Ct. of Errors capable of trying facts. Error of this kind may be brot coram vobis, before the same Ct. which rendered the first judg.t –

Of the General Issue. -

The general issue is a denial of the facts stated in the declar.a -

It is a rule however, in Eng. with regard even to special contracts, that in some cases the gen.l issue may be pleaded when the facts are not intended to be denied. This is the case where the obligor was under an absolute incapacity to contract, so that the cont. is utterly void. But if the cont. is void in its own nature, & not by reason of incapacity in the obligor, the gen.l issue would be ill. -

4. Bac. 61.

This distinction applies to special conts. only; for, in actions upon parole conts. any thing may, in Eng. be given in evidence under the gen.l issue, except the Stat. of Limit.ns or matters of abatement. - Misnomer may be given in evidence to shew a variance in a written cont. between the one declared on & that exhibited. This loseness in pleading is not admitted in actions on torts. -

7 Vin. 132. 133.
4. Bac. 134. 61.
Carth. 387.
Salk. 278.
5. Bur. 2611. 2614.
7 Vin. 218. a.
4. Durn. 612.

In C. it is a rule (established by Stat.) which applies indiscriminately to torts as well as to conts. of all kinds, that any thing except an act of the def. by which the deft. is discharged may be given in evidence under the gen. issue: An act of the def. antecedent to the cause of action (as a licence &c.) may be given in evidence; if the act be subsequent to the cause of action it must be pleaded.

2. Sw. 208.

The Stat. of Frauds & perjuries is included within the terms of the foregoing rule, & consequently may be given in evidence. So also is the Stat. of Limitations; but it appears to be settled that it must be pleaded specially in actions of assumpsit; tho in torts & book debt it may be taken advantage of under the gen. issue. —

2. Sw. 215. -
R. L. 133.

Pleas & Pleadings. – General Issue

Notwithstanding the above rule, it is customary in C. as much as in Eng. in cases of contracts, to plead special matters specially. But in actions on torts the gen. issue is here pleaded in almost every instance —

What is an act of the plf. within the Stat. has been much questioned: as, whether arrest, award &c. fall under this description. – Ark. supposes that an act of the plf. within the Stat. is nothing else than a release of some kind —

2. Sw. 210.
4. Bac. 92-5.

A special plea amounting to the general issue cannot be pleaded in bar, unless it also contains some special matter of justific.ⁿ – Yet at Com. Law such a plea even when bad, cannot be demurred to, but the method is to overrule such plea on motion. – In C. however, a special demurrer to such plea is good —

When the deft. alledges a train of facts which go to prove the gen. issue, & then concludes with the gen. issue by way of inference, the plea is good: as, tho the instrument on which &c. has been altered, & therefore is not the act & deed of the deft. – Such a plea altho' it amounts to the gen. issue, may, if defective be demurred to, the gen. issue never can. – This plea is useful in confining the attention of the jury to a particular fact – It differs from that last mentioned (which amounts to the gen. issue) by concluding with the gen. issue —

Of Pleas in Bar. —

Tho this is applied more particularly to the special answer which is made by the deft. to the plf.'s clar.ⁿ yet any plea in the course of the pleadings, which sets up new matter by way of justific.ⁿ or excu as a reason for not being answerable, is a plea in ba

A plea in bar always admits the original right of the plf. to an action, but avoids or excuses it for some fact that does not appear in the declar.ᵃ which fact is stated in the plea. —

Cro. Eliz. 433. Cro. Jac. 27. 2. Mod. 259.

In every stage of the proceedings, the plea in bar (& indeed all other pleas) must answer the whole of the declar.ᵃ or foregoing plea; for, what is not answered, is taken pro confesso —

A Plea in bar, defective in form only, may, in some cases, be aided by the subsequent pleadings: as, if deft. should make a bad plea; plf. makes a bad replic.ᵃ; deft. demurs specially — here the defect in his plea, if only in form, is cured: otherwise however, if it was in substance, according to the rule that a demurrer reaches back to the first defect. So, if the demurrer be a general one, it reaches his plea & overthrows it, even tho' the defect was only in form. —

Plowd. 230.

2. Co. 4. Latch. 16. 1. Lev. 190.

A plea in bar must be certain to a common intent — vid. author.' —

+ Vin. 216 B. 1. Bur. 310. Co. Lit. 303-4. Carth. 8-9. 1. Sid. 175-6. 2. Vent. 211. 4. Burn. 327. 2. Lev. 234-5.

Duplicity vitiates a plea — This consists in including two or more different defences in the same plea — Distinct counts inserted in a declar.ᵃ & tending to establish the same right of recovery do not amount to duplicity. So, if they do not require different judg.ᵗ it is not bad. But, if different pleas are required to answer them, or if they require different judg.ᵗ the declar.ᵃ is bad. —

Hob. 25.

Altho' there may be two distinct defences stated in a plea yet if it is apparent that one is stated only by way of inducement to the other it is not ill; as, if to an action on a note by a feme covert, deft. pleads that since he gave the note the plf. has married J. S. & that J. S. has given him a release. This is not bad, for altho it would have been enough for the deft. to have pleaded that the plf. was a feme covert, yet he does it here only by way of inducement to shew that the release from J. S. is good. —

Cro. Eliz. 87-8. In order to vitiate a plea for duplicity, each of the defences pleaded must go to the whole action; for if one goes to the part & the other to matter, it is good.

Pohl. 180. The allegn. of immaterial facts it is said shall not be construed to destroy a plea for duplicity reason - So, if one of the defences be so defective & faulty, that

1. Sid. 170. it would be bad, if it stood alone, yet when joined with another in the same plea, it renders it bad.

It has been decided in C. that two distinct de-

4. Bac. 119. - fences do not amount to duplicity, where either of them is altogether frivolous. To constitute duplicity in pleading, there must be two substantial defences.

1. Saund. 337. Duplicity is a defect merely in form, & must therefore

2. Sw. 226. be taken advantage of by special demurrer or not at all.

Departure vitiates a plea. - This is a desertion

Cro. Car. 70. of one defence already adopted, for another distinct from the former, & having no relation to it. As, if to an action for breach of covt. by lessee deft. should plead, per-

1. Sid. 77 - formance generally; Plf. replied & assigned a breach for nonpaym. of rent; deft. rejoined that plf. had ousted him this was held to be a departure from his former plea of performance & therefore fatal.

Of a Traverse. —

A Traverse is a denial of the facts stated in the preceding plea in the same manner that the gen.l issue is a denial of the facts stated in the decl.n — and may be made use of in any stage of the pleadings.* —

*note, the plea of nul tiel record can not be traversed for it is to be deter.d by the Ct on inspection

It is generally made by the words "without that" the facts are thus & thus, recited them as stated in the preceding plea. — And it is a general rule that a traverse must conclude with a verification; "& this the deft. or pltff. is ready to verify." — This holds in all cases where there is new matter stated in a plea; & if this new matter is inconsistent with the facts alledged in the plea to which it is an answer there must be a traverse of those facts.

And it seems to be a rule that whenever in any case a negative is plead the plea must end with an averment & must not conclude to the country; for that is proper only at the conclusion of an affirmative plea — e.g. Deft. pleads infancy in bar; pltff. replies that he ought not to be barr'd without that the Deft. is an infant, traversing his plea of infancy: now here the pltff. cannot conclude to the country but must add a verific.n Leave the Deft. to join that he is an infant, & let him the Deft. conclude to the country. — This rule appears idle, for whenever the parties are at issue, as they are upon the pltff's denying the deft's infancy they ought to join issue by concluding to the country. And the later authorities seem to warrant this latter practice when the whole plea is traversed; but if only some part is traversed the old rule is still adhered to. —

Doug. 50. 412

2. Durnf. 442

Pleas and Pleadings. Traverse.

Hob. 104. 2. Sw. 220. 1. Bac. Ab. 68. 73, 74.

Whenever one party denies a fact alledged by the other by traversing it the latter must generally join issue: For it is a rule of law, that there cannot be a traverse after traverse. To this rule there are some exceptions:-

Pohl. 101.

1. If in an action of trespass the deft. pleads a release or licence for the act of trespass stated in the declaration, & traverses as to the subsequent or antecedent time; the Plf. is not obliged to join in this traverse but may reply by traversing the release or licence. This is traverse after traverse.

2. If the Plf. in his replic. should traverse an immaterial fact stated in the deft's plea, & should also alledge new matter, the deft. in his rejoinder may totally disregard the traverse of the Plf. & himself traverse the new matter stated by the Plf.- This is the regular & proper mo of proceeding; but if the deft. in such case does join issue upon the immaterial fact, & the case goes on to trial, & a verdict found, still no judgm. will be rendered, for the merits of the case have not had a trial.- In this case the Ct. will order a Rejoinder.-

Id. 228.a.

Yelv. 225. A traverse may be sometimes defective, tho it be a denial of the facts stated by the opposite party in his own words: – as if plf. charges deft. with obstructing three of his windows; deft. pleads that plf. ought to be barred without that he obstructed three lights &c. – this is bad for he might have obstructed one. If he had, he would have been liable. – The proper mode in this case is to say "without that he obstructed three lights &c. or any one of them." —

5. Mod. 386. 2. Saund. 124. 1. Durnf. 40. If a replica which is entire, is bad as to part of the plea in bar, it is so as to the whole.

3. Durnf. 151. 10. Co. 92. a. 93. b. 55. Ed. 249. b. It is a rule in Eng. when one party counts on an instrument in any part of the proceedings, he must make a profert of it. – This, however, is not necessary, if it be in the hands of the opposite party, or of some person from whom the party cannot procure it, or if it be destroyed or lost without his fault: but in this case it should be stated to be lost by time & accident &c. – In C. it is not necessary to make a profert, but the adverse party may always demand oyer of the inst. & will be granted it. —

Pleas and Pleadings.

Of Arrest of Judgment.

After a cause has gone on to trial, & a verdict has been found by the Jury in favor of one party, still the judgment may in many cases be arrested. As,

1. If the declaration on the face of it, is such an one as would have been bad upon a general demurrer; i.e. no sufficient ground of action is stated in it, & the verdict of the jury is in favor of the plf. still he cannot have judgmt. but it will be arrested. But if the defect in the declar.n was only such an one as would be bad upon special demurrer; i.e. there is sufficient cause of action stated but stated defectively; this defect is cured by the verdict & judgmt. will not be arrested. So, if there is a defect in any of the pleadings which would be bad on a genl. demurrer, & a verdict is found in favor of the party who made such defective plea, judgt. will be arrested. In some cases however, judgt. will not be arrested for the greatest defects; as if plea in bar, & declar. are both insuffnt. & verdict is found for the def. judgt. will not be arrested in favor of plf.: For, tho' the deft.s defence is insuffnt. it also appears that the plf. has no ground of recovery.

In a civil action where there are several counts & any one of them is defective if the verdict is taken generally upon the whole declarn judgmt may be arrested, but in criminal cases the law is directly the reverse Comyn. 276.

4. Burns. 472.

2. Sw. 261.

4. Bac. Ab. 116.

4 Burr. 470. 2. That circuity of action will be the consequence of rendering judgm.t is sometimes a good cause for arresting it.

2 Sw. 264. 3. In C. judgm.t may be arrested for ~~[illegible]~~ misconduct of jurors, parties &c. This in Eng. is no a cause for arresting judgm.t but is a cause for a new trial, it being a rule there that judgm.t cannot be arrested for any thing dehors the record.

*Ibid. 231.a. Misbehaviour of the jurors & parties are the only

2 Sw. 232. Kirb. 184. extrinsic causes for which motion in arrest lies in C. — Qu. If the juror be an alien, infant, or slave cannot judg.t be arrested?

Motions in arrest must be made in C. within 24 hours after verdict.

*Ibid. 226.b. 4. When issue has been joined between the parties upon an immaterial fact by which the merits of the cause are not determined, judg.t will be arrested. And in this case, the Ct. will order a repleader i.e. that the parties shall plead again. In Eng. when a repleader is order-

4 Bac. Ab. 126. ed the parties begin to plead where the first

Pleas and Pleadings. - Repleader. -

2 Sw. 264. faulty plea was made. In C. they begin at the beginning, & are not bound to plead the same pleas or make the same defences they did the first time. -

Ibid. A Repleader is ordered in C. when judg.t has been arrested for misconduct of parties or jurors. -

Where judgm.t is arrested for the total insufficiency of the declar.a or plea in bar, no repleader

3 Bl. Com. 395. is ordered, for on the face of the record it does not appear, that the plf. in one case, or the deft. in the other, has any grounds of recovery. - But if the plea in bar is good in substance, & the plf. traverses some immaterial fact, upon which issue is joined, a repleader will be ordered, let the verdict be either for plf. or deft. -

For the subject of Repleaders generally, see 1. Bac. Ab. 120-7-8 - -

Of Verdicts.

Verdicts may be either general or special. - A general verdict is one which finds the issue left the jury in a general manner, as that the deft. is "guilty" or "not guilty" - that "he did assume" or "did not assume" the plf. in his declar.a hath alledged &c. - and in ca

generally the verdict should follow the words of the issue, & find all the facts stated, either in the negative or affirmative. — A special verdict recites particularly all the facts found to be proved, but as the jury are ignorant how the law is arising from those facts, they do not decide the cause either in favor of the plf. or deft. but leave the Ct. to do it. —

At Com. Law it is necessary for all the jury to agree in their verdict, & the Ct. will not accept the papers until they are agreed. — In C. the Ct. will receive the papers from a jury without a verdict, if they continue to disagree to the end of the session, but not otherwise. —

An expedient has been devised both in Eng. & C. to evade the rule of law requiring perfect unanimity in the jury: — This is effected by permitting the minority who differ from the majority of the jury to come in silent; i.e. to appear without objecting or directly assenting to the verdict. — And the dissenting jurors are not allowed, afterwards, to testify their difference of opinion from the rest, in order to set aside the verdict. —

2 Sw. 203. — Kirb. 410. —

After the charge to the jury, no further evidence can be given to them, nor are they allowed to hear again the testimony once given. —

Cro. Eliz. 189.

In Eng. no written testimony can be given to the jury without the consent of the parties. — In C. written testimony is delivered to them by the judge without the consent of parties: Nor have the parties the right to withhold such testimony. —

2 P. Cas. 148. — Moor. 452.

Of Verdicts. -

If any paper not given in evidence on trial having any relation to the cause, is delivered to the jury & taken out by them, judgm.t may be arrested. —

2 Ray. 148. - In Eng. if such papers afford evidence for both parties, judgm.t will not be arrested; but if they contain testimy. for one party only the above rule holds. —

A juror cannot communicate to his fellows after they have retired, any fact in his own personal knowledge relative to the cause. - He should have testified it in open Court. -

That a person is acquainted with any of the facts in issue is no legal objection to his being a juror in the cause. But if his knowledge of any of the facts is suggested before the trial, it is usual to dismiss him. —

If a juror eats, drinks &c. after he has retired to consult & before verdict delivered, he is punishable in Eng. by fine. - So such rule prevails in C. - But eating &c. by a juror does not even in Eng. vitiate a verdict unless the food &c. was furnished by one of the parties; & in that case it would vitiate it in C. — Privy verdicts were devised in Eng. for the benefit of releasing jurors from the hardships of abstinence confinement &c. But in C. they are not necessary. —

Of New-Trials.

2. Sw. 270.
+Ibid. 305. 4c

With respect to new-trials, the practice in Eng. & C. is in some respects different; the principles are almost precisely the same.

The general principle upon which Cts. go in granting new trials is that something has intervened which has prevented the cause from being fairly & rightly tried: & it is therefore but reasonable that the parties should have a chance of litigating it again.

The power of granting new trials is incident to the Cts. of Westminster-Hall in Eng. & by Stat. in C. is lodged with the Supr. & County Cts. - and as that Stat. counts upon the "laws & usages already provided" which has a manifest reference to the Eng. laws & usages, the Com. law of Eng. on this subject, is emphatically ours, except where a locality of circumstances or difference of practice renders it unfit or improper.

3. Bl. Com. 387. 8. In Eng. a motion in arrest of judg.t or for a new-
2. Sw. 273. trial must be made, if at all, within the first four days of the next term after the judg.t is rendered. This motion, if allowed, suspends the judg.t & the reasons for a new trial are afterwards discussed before the whole Ct. - In C. a new trial is obtained by petition
2. Sw. 272. to the Ct. which must state all the reasons for the new-trial - It might be obtained on motion as in Eng.

No time is limited in C. for bringing a petition for a new-trial. But it seems after a great length of time it will not be granted. In one case 12 years, in another five, was held to be a bar. A new trial
+Ibid. 233. c. does not stay proceedings on the judg.t in C.

New Trials.

Causes for granting New-trials are,

1. Want of due notice to the deft. — If, however, the deft. appears & defends, no new trial will be granted on this score. For it is merely a matter of abatement, & if the deft. appears & defends it shows that he has had actual if not legal notice. The Ct. will also, imply a consent on the part of the deft. to have the cause proceed & if the subject matter of the suit is within the jurisdiction of the Ct. the consent of the party removes all other objections on this account.

2. Another cause for new trial is, the misdirection of the judge at Nisi Prius, or the improper admission or rejection of testimony by him. This will rarely be a cause for new trial in C., as all the judges here give their opinion to the jury & decide upon the admission of testimony, in the first place therefore, unless there has been a change of opinion in the Ct. no new trial will ever be granted. When the Ct. admit or reject testimony improperly, a bill of exceptions is the course pursued in C.

7 Ld. 397
4. Dunf. 753
6. Mod. 242

3. If one of the jurors was so circumstanced that he might have been challenged at the trial & the unsuccessful party who was entitled to challenge did not know the situation of the juror at the time of the trial, a new trial will be granted. Otherwise if the party knew the fact at the time of trial, & neglected to challenge. In C. a motion in arrest of judgt. is made in this case, instead of a bill of exc. for a new trial. Note judgt. will not be arrested if the cause of challenge is merely a want of freehold interest in the juror.

1. Con. 30.
2. Sw. 232.
2. Sw. 232.

4. Another ground for a new trial is, the
*Vid. 228. misconduct of the jury — as, corrupt practices, par-
tiality, levity, inattention &c. as where the jury threw
Stra. 842 cross & pile to determine the Verdict, a new trial was
Cro. Eliz. 779 granted. And, it will be granted in this case, with-
Barnes. Not. 438. 441. out any reference to the merits of the case; i.e. whether
2. Burr. 11. the verdict is a proper one or not. But it seems
that the jurors themselves cannot testify to such mis-
conduct. — 2u. Can not such of the jurors as were not
concerned in the misconduct testify? —

5. So, misconduct of the parties is a cause for
1. Bur. 390. new trial, and this too, without any reference to the
question, whether the merits of the case have been deci-
ded or not — as, if the party who has obtained the
verdict had spirited away the witnesses, or bribed them
to swear falsely &c. Even if the conduct has been
strictly legal, & yet unfair it may be a cause for a
new trial; as, if the party keeps back evidence in
his possession or takes any other unfair advantage
of the law, a new trial will be granted. —

6. In some intricate cases, the Cts in Eng.
Ld. Hard. 23. will, upon application by one of the parties, direct
2. Sw. 200. the jury to find a special verdict. Tho' in this case,
the jury are not bound to follow the judges direc-
tion; yet if they do not but find a general verdict agt.
the opinion of the Ct. & on enquiry, it is discovered, that
the verdict was found on principles which in the
opinion of the Ct are false, a new trial will be
granted. — So, if the special verdict finds only some
trivial & immaterial facts, without touching the ma-
terial facts, but in issue a new trial will be granted —

New Trials.

2 Sw. 272 con. 7. Where the verdict is contrary to evidence, it is said that the Ct. both in Eng. & C. will grant a new trial. But as the evidence is the peculiar province of the jury, no new trial will be granted in this case, unless there was either no testimony in support of the verdict, or so little & trifling that no impartial & honest Jury could have found it. — And even here, if the fact is frivolous, & one in which the Pl. at most could recover only nominal damages, the Ct. will not grant a new trial.

1. Bur. 3. 11. 2. Id. 664. Stra. 1142. 1. Wils. 22.

Hardw. 23. Id. 307. 8. If the Verdict of the Jury is agt. Law it is fair to be a cause for a new trial. This must happen in a case where there is but little doubt concerning the facts: if in such a case the Jury bring in a verdict, manifestly opposed to law, the Ct. in Eng. have granted a new trial. — In C. this has not been recognized as a cause for a new trial. —

Barnes N. 404. Stra. 940. 1051. Lack. 647. 9. A new trial is sometimes granted for smallness of damages; but this is rarely done, where the damages are in their nature presumptive, as is the case in torts. Where the action is founded on a contract & the damages can be ascertained, if the Jury have not given enough, a new trial will sometimes be granted.

1. Bur. 609. 2. Wils. 205. 244. Stra. 425. 641. 2. Sw. 272 con. 10. Nearly the same observations apply in case of excessive damages. — Where excessive damages have been given in an action upon contract, the Ct. will not hesitate to grant a new trial. But in actions on torts they are very careful: and it would seem from some of the cases that the damages must be so outrageous as to carry conviction of corruption, or, hostility in the Jury, before the Ct. will grant a new trial: but there are some cases, where it has been granted, when no such presumption could arise: as, in an action for assault & battery. — & semble, in an actn. for slander: but it was denied in an actn. for crim. con. — How is it in cases, per quod for debauching a daughter.

Comyn. 230. 2. Wils. 252. 4. Durf. 651.

5. Durf. 257. 4. Id. 654. 651. 2. Durf. 167. 5.

2. Dunf. 131. 7 Ved. 397. Salk. 244. qu. 36. 245.

11. A new trial is granted for a mistake by counsel: i.e. when counsel plead the wrong plea, mistake the defence &c. But for neglect in counsel a new trial is never granted. The party aggrieved is left to his remedy ag.t his counsel.

12. That a material witness was, by inevitable accident prevented from attending the trial, is a good cause for a new trial. If the witness was wilfully absent, no new trial will be granted; but the party is left to his remedy ag.t the witness himself. i.e. if he is a bankrupt, the party is remediless.

3. Bur. 1771.

13. If a case has been lost by the testimony of persons infamous, whose infamy was at the trial unknown to the party petitioning, a new trial will be granted. In Eng. this rule extends only to persons legally infamous; but in C. to those whose moral character, is really infamous, without the intervention of a judicial sentence*. So, in all cases if a judg.t has been obtained by false swearing a new trial will be granted.

*qu. does moral character here, extend beyond "truth and veracity?"

14. Another, & the most common ground in C. for a new trial, is the discovery of new & important testimony. On this head, it has been settled, that testimony which was, or by due diligence might have been, in the knowledge of the party at the trial, is not new in ye sense of ye rule, & therefore for such testimony a new trial will not be granted. So, a new trial will never be granted, to give a witness who was improved at the former trial, an opportunity of testifying something which he forgot or omitted at that time. In order to give the Ct. an opportunity to judge of the importance of the new testimony in this case, it must all be stated in the petition for a new trial; & the witnesses must be brot before the Ct. & examined; and, if upon such examin.n it is found important, a new trial will be granted.

1 Dunf. 84. 2. 36. 113. 3. Bur. 1385. 1. Salk. 84. 1. Wils. 98.

New Trials.

#Ted. 131. In C. if, in an action of book-debt, deft. knowing that he owes a certain sum, & expecting that the plf. will take judg.t for that sum only, does not appear, & plf. takes judg.t for a larger sum; deft. may have a new trial: The Ct. considering him as not guilty of laches in such a case, but he pays the expence of the new trial.

Cases in which a New Trial will not be granted.

Salk. 273. 627. If a cause has been lost tho' any negligence or omission of the party, a new trial will not be granted.

2 Burr. 113. 1238. If by a mistake in computation, the plf. has obtain a verdict for more than is due; a new trial will not be granted on account of the mistake, if the plf. will remit the excess. - This rule, it is evident, is applicable only in case of contracts. -

2 Stra. 889. 1238. 1. Show. 330. In criminal prosecutions, if the deft. has been once acquitted he is not to be put in jeopardy again, & a new trial will not be granted. - So, in actions on penal Statutes, it is a general rule that a new trial will not be granted in favor of the public, or prosecutor, in any case except where the deft. has practised fraud to avoid a conviction; & this may extend to criminal cases. - It seems Sack. 646. too that in Eng. a new trial has been granted the public, 5. Burr. 26. for a misdirection by the judge; but whether this is law, is qu. 4. H. 758. doubtful. - 2ly. if it is law, does it extend further than to actions on penal Stat. which are considered as civil action #Ted. 5. 427

New Trials.

0. Durn. 638. In Eng. a new trial may be granted in favor of persons convicted, if the offence charged is not higher than a misdemesnor. And, in C. the rule is extended even to felonies

Where there are several defts. and one is found guilty & the other acquitted, a new trial is not granted in Eng. in favor of the one found guilty. This is founded on the principle, that if it is revived as to that one, it must be as to all, it being necessary to revive it, in the same situation in which it was at the first trial. But, from a late decision, it appears that the Cts. are inclining to dispense with this rule, & to admit it to be revived as to those only who have been found guilty. This is the practice in C. the Cts. considering the Defts. as interested, not jointly, but severally. 0. Durn. 638.

Salk. 644. 110. 645. 8. 4. Durn. 468. If the action is a hard one, one founded in maleficio, or brought merely for the gratification of the passions of the plf. & the deft. is acquitted, the Ct. will not grant a new trial. So, if it is an action in which the plf. would be entitled to nominal damages only, a new trial will be refused, but it must be an action founded on a tort. The basis of this rule is, that strict justice has been done between the parties, tho' not strictly according to law. 2. Durn. 4.

So, a new trial will not be granted in favor of the deft. in order to enable him to plead a plea which, tho' it may by law be a defence, yet is one, that in conscience & justice he ought not to make use of, as, the Stat. of Limitas & in one case, in C. the Ct. would not do it, to enable him to prove usury.

New Trials. —

The Ct. when they grant a new trial, have the power of imposing terms, upon the party to whom they grant it. As, that he shall pay the costs of the trial &c. and this is generally required of him, if the other judgt. was not obtained thro' the fault of the jury, or the other party. In those cases, they suffer the Costs to abide the event of the second trial.

Consequences of a New Trial.

7 Ved. 229. 2. Sw. 176. The granting of a new trial, in C. vacates the former judgment. — But to prevent the inconveniences which would result from this principle to the petitioner if the petitioner should be, or become a bankrupt, or if he should be out of the State; or, if land taken in exn. on the former judgt. had been sold, it has now become a settled rule in C. That a new trial shall not be granted without laying the petitioner under such restrictions, or exacting of him such security, as will place the opposite party in as safe a situation, as he was in, when the petition was preferred. —

Of Audita Querela. —

1. Rol. 307. — 310. — 2. Sw. 273.

An Audita Querela is a writ, which is used by a person ag.t whom ex.n has issued, & is operating, to obtain relief ag.t such ex.n, which for some reason he ought not in justice to be bound to pay. — This may be the case, either when judg.t itself ought not to have been obtained, or when the def.t can shew something which will discharge him from liability on that judg.t as, payment, a release from the plf. &c. In all such cases, the officer who holds the ex.n is not warranted in judging of the validity of a release &c. so that he must proceed in levying the ex.n; therefore, the audita querela is the def.ts only remedy. —

In C. this writ is granted only by the Chief Justice of the Com. Pleas, or in his absence the next inferior Justice of the Quorum. — It is a writ not granted of course, but at the discretion of the judge, who examines the facts stated in the petition & decides on the justice of the petitioner's claim to relief. — The writ, when granted, is a Supersedeas to the ex.n, it containing a direction to the officer to forbear further proceedings upon it. —

On taking out the writ, a bond must be given, to answer to the adverse party, all damages, which he may sustain, in case, the audita querela, upon the trial, is determined to be without foundation.

If it is determined in favor of the one who takes it out, it not only vacates the ex.n, but also gives him damages for the injury sustained by reason of the ex.n, & if he has paid any thing on the ex.n which he ought not to have done, he may also recover that. —

This writ discharges the def.t in ex.n from prison, & the bond serves as a Security substituted for the prisoners person: And in this case, the aud. quer. is a total & final Supersedeas, & the bond, is the only remedy for the plf. in the ex.n —

Audita Querela. —

The most general cases, in which an aud. quer. may be had are the following. —

Where a debtor imprisoned on an ex.n is liberated with consent of the creditor; and is afterwards hurried with the ex.n he is entitled to an aud. quer. —

If the deft. "has had no day in Ct." — as if judg. has been rendered on confession or otherwise; ag.t a minor, without his guardian, an audita querela will be granted. —

This writ lies also, when judg.t has been obtained by fraud & ex.n has issued. —

It was also deter.d by our Sup.r Ct. to be the proper remedy in a case where, pending an action on note deft. paid the note, & ~~gave~~ took a discharge, but the plf. notwithstanding, took judg.t by default, & ex.n. The Ct. considering the deft. as not having had a day in Ct. he being justifiable in this case, in trusting to the plf's promise to withdraw the suit. —

If a deft. is by duress, or a groundless arrest, by the opposite party, prevented from attending Ct. & thus judg.t goes ag.t him, he is entitled to an aud. quer. on the ground of not having had a day in Ct. —

If two judg.ts are obtained, & two ex.ns taken out ag.t two joint & several obligors, for the same debt, it is a rule that only one can be satisfied, any farther than for the costs: Therefore, if after payment of one, the other is hurried, for any thing more than the costs relief may be obtained by aud. quer. —

If one who has taken out administr.n recovers judg.t & takes out ex.n ag.t a debtor & an executor afterwards appears, & proves the will of the dec.d the debtor may have an aud. quer. ag.t the adm.r if the latter hurries him with the ex.n —

Aud. Quer. 1 Lovelas. 19. 20. 50. 2. Bac. Abr.

Vid. 167. a.

If an absconding debtor had, before he absconded, taken ex.n ag.t a debtor of his, & put that ex.n into the hands of an officer; such debtor, tho' factorized in a suit ag.t the absconding debtor, is obliged to pay the ex.n into the hands of the officer; and in so doing he is indemnified ag.t the foreign writ, instead of being driven to aud. quer. ag.t the officer. — Qu. Must the money, in this case, remain in the hands of the officer? —

If a bond given by two joint-obligors is paid by one who has left the State, & the remaining obligor is sued, & has judg.t ag.t him, on which judg.t debt is brot, & ex.n taken out ag.t him, who has paid the bond, an aud. quer. lies, if the action of debt on judg.t is brot within the State. — And, if brot out of the State, a new trial may be had. — N.B. When one of two joint obligors has left the State, Choice on y.e one remaining, is good as to both. —

In Eng. upon affidavit of the party applying for relief ag.t an ex.n a rule is granted for the other party to appear, & deny on oath, the facts stated by the applicant. — If the party served with this rule, appears & denies the facts on oath, an aud. quer. may be had to try the facts: If he does not thus deny them, the ex.n will be set aside. —

Of Evidence. —

Bul. 1. P. 293. Esp. 780. 4 Mod. 14. 2 Sw. 248. 1. Dunf. 323. 3 M. 157.

It is a general rule in the introduction of evidence before a Ct. That the best evidence which the nature of the case admits of, must be adduced. The meaning of this rule, however is confined to this, that the evidence adduced must not ex natura rei, suppose evidence of a higher nature which is kept back, as if the Ply. should attempt to prove by parole, that the deft. had given him a bond, this would be rejected, for the circumstances of the case, show that there is higher evidence kept back. viz. the bond itself. —

But there are exceptions to this rule. As,

Ibid. Esp. 782. 2. Sw. 234.

In case of Records which are of a public nature, which for the benefit of the community at large are to be kept in a particular place, Copies are good evidence, tho' not of so high a nature as the record itself. —

So, if the original instrument is lost or destroyed, a copy, or even parole proof of its contents is admissible. —

Bul. N. P. 294. 1. Ves. 505.

So, if the person wishing to improve a written instrument in evidence, is not his law entitled to the custody of the instrum.t he may in some cases prove it by copy or parole testimony. —

Bul. N. P. 297.

Another rule is that parole testimony is not to be admitted to contravene or vary the import of a written instrument. But it is admissible to prove fraud in the execution or illegality in the consideration; for that goes to shew that the instrum.t never had any operation. —

So, where an ambiguity arises from something extrinsic, or dehors the instrument parole proof is admissible to shew the application or meaning of the terms made use of; as where there was a devise to my cousin Chas Clere & there were two of that name parole proof was admitted to shew which was intended. — And this is called a latent ambiguity. —

Ibid. 333. 1. Bl. Reb. 60. 5. Co. 2 Rol. R. 27.

Ved. 330. 8 Co. 154. 2 P. Wms. 137

But where the ambiguity arises from the terms of the writing itself, & not from any thing extrinsic, recourse cannot be had to parole evidence to prove the intention. This is called a latent ambiguity. —

Moor. 105. 2 Atk. 240. 6 Co. 10. 2 Ray. 831. 1 Br. Ch. R. 472. —

The rule, however, has been extended as far as this, if the words on the face of them have an equivocal import, or even, if they are apparently plain, & have a definite meaning, yet parole proof will be admitted of the circumstances of the parties, to shew what their intentions must have been.

1 Wils. 313. 2 Atk. Bul. N. P. 297. 2 Ser. 247. — Ved. 83. 337. —

Parole testimony is also admissible to rebut an equity, or oust an implication of law, that is, where Cts. of Equity have given a construction to words made use of in an instrument different from that put upon them by Cts. of Law, parole proof may be adduced to shew that the intention was that the legal construction should prevail.

Gilb. L. E. 107 Bul. N. P. 294. 2 Mod. 283. 2 Ser. 245. 6.

As a general rule, hearsay testimony is inadmissible. Cts. in most cases it is not the best evidence the case admits of; and, as evidence upon oath only, is admissible, the first speech being without oath, it does not render the evidence good, that the witness who testifies in Ct. tells upon oath, what he heard spoken by a man not upon oath. — To this rule there are some exceptions. —

1. Proof of what one has said before trial, may be adduced to impeach his testimony, when called as a witness. — The same kind of testimy. may also be adduced to corroborate the evidence of a witness, who has been impeached. And in the case of children adduced as witnesses, proof of what they have said before trial may be brot to strengthen their testimony, tho' it has not been impeached. —

Ved. 240. a.

Vid. 240. 2. What a party has said respecting the cause,
Bul. N. P. 294. against himself, may be proved; but not what was in his favor, unless the other party was present at the conversation & did not disagree to it. — But
Kely. 18. the confession of a man, against any other person is inadmissible; and difficulty frequently arises, in seperating the parts of a confession, so as to introduce only that part which makes agt. the person confessing, & reject that which applies to other persons; but this must be done if possible. —

2 Burr. 53. 3. Proof of what a dead person has said respecting
Cowp. 621. the boundaries of land, a prescription, a right of way &c. where such person may be supposed to have known, & to have been uninterested, is good testimony. —

1 Bl. Rep. 404. 4. Hearsay is good evidence respecting the pedigree
Bul. N. P. 294. marriage connections &c. of a family: — also, respecting the
2. Sw. 245. 0. — fact of a person in a distant country being dead, or of the situation of such person, as to property &c. —

Bur. 1244. 5. What a person has said, in contemplation of death, whether he in fact dies or not, may be proved; & the law considers it of as much efficacy, as if it had been said under oath. The words of a person thus circumstanced may be proved, in all cases, in which they might have been proved, if they had been sworn to. —

2. Bur. 1255. 6. What has been said, before death, by persons mortally wounded, may be proved, in a criminal prosecution, agt. the person accused of having inflicted the wound. —

7. A witness may be impeached in respect of his veracity, & in this case hearsay is the only proper evidence, & that too of his general character as to truth & veracity, only. — It is questioned, whether an enquiry ought not to be tolerated, as to his general character, not only for veracity, but for integrity also. —
Bul. N. P. 297. The character of a witness can never be impeached by the party who brought him forward to testify. — 2 Esp. 17.

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8. In actions of slander hearsay testimony, & that only, is admitted to prove the character of the plf. unless he has been accused by the deft. of particular facts, in which case they may be proved. This rule is founded on this reason: That in general, a person is not supposed to come prepared, to disprove particular charges, but it is presumed that he is always ready to support his general character. —

Bul. N. P. 296. Ib. ~ 88. q. — In some cases the character of a party may be examined in others it cannot. — As, if a man is sued for a battery, no evidence can be admitted to prove his irascible, habitually quarrelsome &c. So, in an action for a malicious prosecution, the plf. cannot prove that the deft. has a malicious disposition. — But, if, in an action of book debt, plf's book is disputed testim. may be introduced to prove that he is not a person who adheres to the rules of honesty, in keeping his accounts. — The distinction deducible from the books, appears to be this: — If what one party attempts to prove respecting the character of his antagonist, goes directly to weaken the charges, defence &c. of the latter, he may go into the proof: Otherwise he cannot. —

Ib. ~ 88. q. Bul. N. P. 295. D. — In some cases, besides slander, particular facts relative to a party's character may be proved. This is the case, when the character is put in issue, i.e. when the character of the party determines the right to recover. As, in case of a suit upon a bond given to a kept-mistress particular facts as to her character, are provable for if she was a person of good character before her connection with the deft. she will recover, otherwise not.

So, in an action on a promise of marriage, proof of the kind last-mentioned is admissible. —

Who may be Witnesses. —

Generally every person is a good witness, unless excluded, 1. On account of being infamous. 2. For want of discretion. 3. On account of interest. —

Co. Lit. 6. Eff. 223. Gilb. 100. 2 Stra. 1148.

1. Persons infamous are not allowed to testify. — By infamous persons in this case, is meant those who have been convicted of treason, felony or the crimen falsi, as, perjury, forgery, or any other crime which in its own nature, impeaches their integrity, and shows that the man capable of committing it is destitute of the common principles of honesty. —

3. Lev. 420. Salk. 690. 2. Wils. 18.

It is the nature of the crime, & not of the punishment, which renders a person infamous. — And the evidence necessary to prove a witness infamous, is the record of the conviction. —

2. Salk. 514. 690. T. Ray. 32. 306. 5. Mod. 15. —

In Eng. a pardon, after conviction, restores competency to the witness; unless it is part of the judgment that the convict shall be disabled from being a witness, as in case of a prosecution for perjury on the Stat. —

3. Lev. 420.

& Statute pardon, however even in this case will restore his competency. — Mr. R. doubts the propriety of a pardon's restoring competency in any case; for tho' it frees from punishment, it does not restore innocence, or integrity. —

In C. the Cts have admitted proof of a witness having lived an honest & unimpeached course of life for 20 years after being convicted of the crimen falsi, & upon this testimony admitted him as a witness. —

Co. Lit. 6. Eff. 720.

Infidels or persons not believing in the Christian religion, were formerly inadmissible. — But now, any person believing in the existence of a God, let his religious tenets be what they may, is a good witness. So that any person except an Atheist, may be a witness, & every person is to be sworn according to the

Cowb. 309.

Evidence.

Stra. 1004.
1. Atk. 21.
1. Wils. 84.

ceremonies of the religion he professes. — A Mahometan & a Gentoo have been admitted in the Eng. courts. —

E. 3. 728.
5. Durf. 158.

The affirmation of a Quaker, is to be considered as an oath, in civil cases; but in Eng. they are not admitted to testify in criminal cases, upon affirmation. — In C. they are admitted in both cases. —

Bul. N. P. 293.
Esp. 727.

2. Persons wanting discretion are inadmissible as witnesses. Of this class are idiots, lunatics &c. and, generally, all persons incapable of understanding the nature of an oath. — This rule also applies to children if they know the nature of an oath, & are capable of distinguishing right & wrong. — Frequently when they have been too young to be sworn, they have been admitted to tell their story to the C. without being put upon oath. — They have been admitted as young as five years, & rejected when older. —

Id. 737.
Bul. N. P. 293.
1. Stra. 700.

Co. Lit. 6.
2. Rol. Ab. 686.
Id. 27. 26.
2. Durf. 203
4. Durf. 678.

Husband & Wife cannot testify for, or against each other; & this not on the ground of interest, but on that of policy, to preserve domestic tranquillity; for if the husband consents to his wife's testifying against him, she cannot be admitted. But to this rule there are some exceptions: —

Esp. 721. 1. A second wife married while the first is living may testify for or agt. the husb. - (Note, the second wife, in this case, is no wife.).

Cro. Car. 488. 2. The second exception is that of a woman forcibly carried away & married. (Note, here the married woman, is not married!.

2. Hawk. 432. 1. Bur. 542. 3. Husb. & wife may each swear the peace agt. the other, & thus procure bonds for good behaviour. -

Aut. 110. 1. Stra. 633. 4. The wife may be admitted to testify agt. her husb. when publicly prosecuted for personal abuse to herself. -

2 Hawk. 432. L. Ray. 1. 5. In cases of high-treason the wife is admitted in Eng. as a witness agt. her husb. - Qu. in C.? - All the cases in Eng. have been where the treason was agt. the person of the king. --

1. Stra. 504. 527. 6. The declarations of the wife, respecting matters peculiarly within her province, have been admitted, to charge her husband; as, with regard to a contract for nursing a child &c. - Qu. Is this law, where the husb. is one of the parties to the suit? -

2 Stra. 1092.

Esp. 488 &c. Where the legitimacy of a child is the point in question, if it was born after marriage, husb. or wife. can neither of them be witnesses to prove it to be illegitimate; but they may testify that no marriage between them was had. So, the wife may testify to the fact of access by the husb. but she cannot be admitted to testify that there was no access. -

Ibid. 40. a. 1. Ld. Ld. 340. Cow. 592.

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Eq. 717. 1. Vent. 197. Sumo. 1 Ves. 63. Cowp. 845. 4. Durn. 431.2.

A Counsellor or Attorney, cannot be a witness to divulge the secrets of his client. And this is the privilege of the client not of the attorney, for if the latter is willing to testify, the Court cannot hermit it. — Facts, however, which have come to the knowledge of the attorney from any quarter but from the client himself, he is as much bound to disclose as any other person — And the client must have communicated them to him, by way of instruction, pending a suit or the rule does not hold. —

4. Durn. 758. L. Ray. 733. cont. Eq. 719. —

It has been adjudged, both in Eng. & C. that other persons, who have been confidentially entrusted with facts relative to a cause, by one of the parties, may be made witnesses.

Eq. 703. &c.

3. Interested persons, may not be witnesses. — But the interest which excludes in this case, must be pecuniary. An interestedness of feelings, or bias in favour of one party, does not to the competency, but credibility of a witness. —

Eq. 707.

Salk. 283. Stra. 575.

The interest must not only be pecuniary, but it must be certain & vested, not contingent — If it is certain, it is no matter how remote: As, a remote remainder-man cannot be a witness, but an heir at law may be, tho his ancestor be on his death bed. —

3. P. Wms. 181. 1. Ve. 287. 290. 1. Mod. 10. 1. Durn. 10. Eq. 704.

Tho' a bare trustee may be a witness, but he must be free from all liability. As, an Executor, who is not a legatee, & is not liable to pay costs. (Note, in C. ex. an. liable to costs: tho' if the suit brot by an ex. is a hopeless one, he is recumbered his costs out of the estate.)

2. Stra. 1025. 1. 06.

A prochein ami, who commences a suit for an infant, is not admissible, he being liable for costs —

The wife of a brother ami however, has been admitted. vid quare de hoc.

1 Vern. 254. — Qu. Eq. 715. — The quantum of interest, is thus not to be regarded. Consanguinity, or nearness of relation, thus, to one of the parties is no objection. —

Salk. 289. 1. Wils. 332.

A witness may be interested, in the event of a cause; or, in the question agitated in the cause. —

An interest in the event, is where the witness will lose or gain something, by the decision of that case in which he is offered: — as, if he is bound to pay part of the costs or damages. If the loss will be only consequential, it is the same thing; as, in the case of bail, thus cannot be witnesses, for if judgt. goes agt. their principal, they become liable, if he fails to satisfy it. The true rule is this, if the record of that case in which the witness is adduced, can be ever made use of, either for or agt. him, he is interested in the event. —

3. Mod. 114. 1 Dunf. 104. *Id. 242. b.

Witnesses interested in the event, have been uniformly excluded by the Eng. Cts. —

1 Stra. 310. Eq. 703. *Id. 242. a.

An interest in the question, is where the judgt. to be obtained, tho' it cannot be made use of, directly, either in favor of, or agt. the witness, yet may operate in an indirect manner to his prejudice or advantage. as if the witness has a cause, under precisely similar circumstances with that in which he is about to testify. So, if he is a person who has been injured by an act which is an offence agt. the public, & a public prosecution is not forward agt. the offender, here if he is offered as a witness, he is interested in the question; because altho' the conviction of the offender, which may be obtained by his testimony, can never be improved by him as proof in a private suit for his particular damage, yet it is evident that it

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will help his side of the case, by giving the Jury an idea that the deft. has really committed the act charged, & thus influence them to give a verdict in favor of the plf.

Gilb. 89. 90. Hardr. 331. — The decisions in the Eng. Cts as to the admissibility of a witness interested in the question have been perfectly contradictory — In case of an indictment for an assault & battery, & any open violence, the person injured has always been admitted. — In cases of public prosecutions for forgery & perjury they have been uniformly rejected. In usury, if the witness has paid the note, he may testify; otherwise not. — In cases of prosecutions for cheating, the person cheated has in some instances been admitted, & in others rejected, apparently, without any distinction in the cases. —

2 Stra. 1043. 1104. 4 Bur. 2255. Salk. 283. 6. 7. Mod. 119. Stra. 595. 2 Ray. 396. 1. Vent. 49. 351. 1 Durn. 303. Stra. 1054. Stra. 595. 414. 944.

In an action agt one underwriter, another underwriter to the same policy has been rejected. — In an action by a parent for debauching his daughter, the daughter was admitted — In an action by a master for a battery to the servant, per quod servitium amisit, the servant has been both admitted & rejected. —

1. Durn. 163. 4. Bur. 2255. 3. Durn. 27. 308. 2. Durn. 490. 4. Br. 20. 589.

Thus were the authorities in a perfect chaos, as to principle, when Ld Mansfield, in the case of Abrahams v. Bunn, first broached the doctrine which was finally settled in the case of Bent vs. Baker, "that interest in the question, should never exclude a witness; that it should go to his credibility only, & not to his competency." And this now appears to be the rule followed in the Eng. Cts. —

In C. the decisions stand much as they did in Eng. before the case of Bent & Baker — In cases of a public prosecution for any open violence as an assault & battery, the person injured, is admitted as a witness; but in prosecutions for forgery, perjury, & usury, they are rejected, unless in the last case the money has been paid. —

1. Sid. 115.
3. Durn. 33.
Doug. 134.
2. Durn. 496. cont.
Doug. 134.
1. Bl. Rep. 305.

When a witness is in any way interested, whether in the question, or the event, a release from the party to whom he will be liable, restores him to competency, & removes all objection to his admissibility. - But it is still a question whether a witness to a will who at the time of attesting it was interested, can become by any ex post facto matter, as a release &c. a competent witness to prove the will. - There have been three cases decided in point on this subject; two in favor of the affirmative; & the other, in the negative; but the number of judges is equal.

2 Stra. 1253.
1. Bur. 414.
Pow. on Mort.

7 Vid. 241. b.

To the general rule, that persons interested in the event are not competent witnesses, there are some exceptions at Com. Law, & some by Stat. but all, founded, as it is said, on the necessity of the cases: -

3. Durn. 35. b.

1. When a person is employed by another, as an agent, to transact business, as, a carrier, factor &c. he may testify in an action brot ag.t his employer, for a failure, fraud, &c. in the same business, that he has transacted the business, faithfully, & according to his duty; tho it is evident he is directly interested in the event. - But, if an action is brot ag.t a master to recover damages for the negligence of his servant, the servant cannot testify for his master, without a release. -

4. Durn. 589.
3. Bl. 35. b.
3. Wils. 40.
11. Mod. 261.
Stra. 507.
Salk. 289. -
Stra. 1083.

Gilb. L.E. 89. 93.
2. Rol. 685. b.

2. When Stat.s have given rights or remedies, of which the person entitled to them cannot avail himself, without interested witnesses, they are admitted: And in many, perhaps most cases, the plf. himself. This clearly, is grounded on the idea of necessity; for if these persons were not admitted, the Stat. would fail totally, of any effect. As, in an action, on the Stat. of Winton. ag.t the hundred, by a person who has been robbed he is himself a witness to prove the robbery. - So, under our Stat. giving treble damages ag.t the thief to the person from whom property has been stolen

the party injured, may himself testify in his own case, as to the theft; tho' not as to the thief. So, in an action under our Stat. for a private assault, the person assaulted, is a good witness, & necessarily, the only one. Mk. thinks that, as in all these cases, the party is admitted as a witness ex necessitate rei, because it is supposed there are no other witnesses. if there are other witnesses, the party ought not to be admitted.

#Ibid. 383.

6. Mod. 211. 5. Ray. 396. 730. +Ibid. 212. a.

3. In case of a rescue, the person rescued may be a witness ag.t the rescuers, tho by subjecting them, he may discharge himself.

2. Salk. 690. +Ibid. 100.

4. In case of a voluntary escape, the person escaping may testify in an action brot ag.t the Sheriff for the escape. This is the strongest case of interest that can be put, for if the escaper can prove it to be a voluntary escape, he exempts himself from any liability whatever.

Skin. 585. Stra. 101. cont. Bul. N. P. 245. Stra. 652. 1. Stra. 406. *Ibid. 241. b.

5. A person who becomes interested by his own act after a party has a right to his testimony, may still be made a witness, & compelled to testify: as, if a witness has laid a wager on the event of the suit. So, if a subscribing witness to an instrument has become bail for one of the parties, he must still testify to the ex.n of the instrument & in this case, if he were bail for the deft. he would be obliged to testify, ag.t his own interest directly.

1. P. Wms. 290. 2. Vern. 599. 1 Stra. 101. cont. 2 L. Ray. 1008.

6. If a person, after having given a deposition in a cause, becomes interested by act of law, his deposition may be read. Query, Is the rule the same, if the person became interested by his own act?

1. P. Wms. 299. 1. Vent. 212. 357. Cro. Car. 301. Esth. 715. Gilb. L. E. 91. 2. Ld. 109. 2. Show. 47. 4. Burr. 17. 20. 1. Id. 302.

7. According to some Eng. authorities, members of corporations may testify in cases, in which their corpor.n is concerned, if their own interest is trifling; as, in a suit for the penalty inflicted by a bye-law of a corpor.n. so in case of a devise to a parish, the parishioners, have in some instances been admitted. But, the current of auth.s is ag.t such an admission.

In C. it is a general rule, that members of a corpor.a are competent witnesses, in cases, in which the corpor.a is interested. There is an exception to this rule, in cases where from the nature of the business, & common usage, it is not to be supposed that the cont. depends on parole proof:- For, the members of corpor.as are here admitted, in these cases, on the ground of necessity. - And in no case, can the agent of the corpor.a testify, even in C., that is the agent, who transacted the very business, concerning which the action is brot, tho' he is no more interested than any other member of the corpor.a.-

5. Burns 371.

S. In the action of Account at Com. Law & in that of Book Deft. by our Stat. all interested persons are witnesses.-

Q. In a Ct. of Ch.y in some instances the parties not only may be witnesses, but they must testify even as! their own interest. This, is when one party, appeals to the conscience of the other, to disclose the facts relative to the case; & the party appealed to, must testify or the allegations of the opposite party, will all be taken pro confesso, & a decree founded upon them as if true.- But in this, as well as all other cases, if the testimony of the party will criminate himself, or subject him to a penalty, he is under no obligation to testify. - However if the penalty is going to the pltf. & he will waive it in his bell, then the deft. must testify.-

Evidence.

Stra. 129. Eff. 707. If a person thinks himself interested, tho' he is not so in fact, or, if he conceives himself bound in honor tho' he clearly is not by law, he cannot be admitted as a witness. This has been recognized in C. as good law.

Bul. N. P. 280. Cowp. 199. 2 Hawk. 434. A particeps criminis, or accomplice, is a good witness agt. his fellows, tho' he is in many cases interested in the event. This kind of testimy, therefore, is very suspicious.

10. Mod. 193. There are two modes of proving a witness interested: 1. By examining other witnesses, & thus proving it like any other fact. 2. By examining the witness himself upon the voire dire. Resort can never be had, to but one of these methods at a time. After examining a witness on the voire dire, other witnesses may not be examined to prove his being interested, & è converso.

1 Sid. 441. If a plf. sues several, & wishes for the testimony of one of them, he may strike his name out of the record, & then improve him as a witness.

Bul. N. P. 285. 1 Stra. 533. If the plf. arbitrarily makes one a deft. to prevent him from testifying for the other deft., his evidence may be obtained in two ways:— 1. If there is no evidence agt. him, the Ct. on motion, will exhunge his name from the record:— 2. If there be some slight evidence agt. him, he may be tried first, & if acquitted, may then testify.

Eff. 142. 3. Dunf. 749. A witness is not allowed to write his testimony, & read it in Ct.; but he may refresh his memory, with memoranda. But, if he cannot swear to the facts, from his recollection, or testify that they are true, otherwise than because he finds them written, the original notes of the facts must be adduced: 3 Dun. 753. As to names & dates, however, the rule is not so strict.

Cf. 708.
3. Dunf. 27. 34.
1. Id. 296. 300.
5. Id. 57.
2. Stra. 728.
1. Bl. Rep. 355.

No person can be admitted to invalidate, by his testimony, any negotiable instrument, to which he has ~~contributed~~ given credit, or given currency, by signing his name. The rule, however, is confined, strictly to negotiable instum.

3. Bl. Com. 371.

Facts may sometimes be proved by presumption: but it is said that in order to amount to proof it must be a violent presumption. A probable presumption it is said can never amount to sufficient proof. The truth is, that all the distinctions made between the different kinds of presumption are unnecessary: If the proof offered amounts to enough to satisfy the mind, it is all that is sufficient.

2. Hawk. 431.
L. Ray. 39.
4. Dunf. 498.

Proof may in some cases be derived from a similitude of hand-writing; as, if the subscribing witnesses to an instrument are dead, proof of a resemblance between the hand-writing of the name of the obligor of the ~~instrument~~, & his other hand-writing, is admissible to prove the ex.n of the instrum.t by him. But, proof of this nature is very slender, & is admissible only in civil cases, not in criminal.

Evidence.

of the number of Witnesses.

Carth. 144.
1. Show. 158.

At Com. law, no fixed number of witnesses is necessary to establish a fact. Such testimony as satisfies the triers is sufficient. The rule, indeed is, that a fact cannot be established, without the testimony of one credible witness or what amounts to it. — It may, therefore, be question whether, under our law, one deposition unsupported by another evidence, is suff.t to establish a fact, for a deposit.n is not as good as a witness testifying viva voce. Mr. R. says, that if the deposition in this case, satisfies the jury, it ought to be deemed suff.t since the quantum of testimony cannot be measured by any rule. —

4. Bl. Com. 358.

In one case, a single witness is insuff.t at Com. Law. This case is in a prosecution for perjury. —

4. Bl. Com. 356.

By Stat. two witnesses are necessary to convict of treason: But, it is not necessary that both testify to the same overt act. —

1 Vern. 101.
2. Ab. 283.

In Ch.y the testimony of one witness, when opposed by the defd.s answer, is insuff.t; for, that being given in upon oath, it is only one witness ag.t another.

By Stat. in C. no person can be convicted of a capital offence without the testimony of two witnesses, or "what is tantamount."

The confession of a criminal is good evidence ag.st him; but a bare confession, out of Ct. is not sufficient to convict him. —

A confession before a Ct. of enquiry, must, at com. law, be reduced to writing. In C. a justice of peace is permitted to testify viva voce, what was said before him by the accused; but no other person can thus testify. —

Of the manner of getting Witnesses to Court. —

Witnesses are compelled by Sub-poena to attend, & are liable to fine on failure. If the Sub-poena is signed by the Clerk of the Ct. disobedience may be punished as a contempt. In C. it may be signed, either by the clerk of the Ct. or a justice of peace. — But a witness cannot be punished here for disobedience to a Sub-poena, unless his lawful wages for travel, & enough more to support him one day at least, are tendered to him: And after he has appeared & staied as long as the money given him would support him, he cannot be compelled to stay longer, unless money is tendered him for his further support while he attends. — In Eng. no legal wages being established for witnesses, their reasonable expenses must be tendered. — If indeed a witness voluntarily refuses the money tendered, prevents it from being tendered, or prevents the service of the Sub-poena, by acknowledging service; he is liable to fine as much as if the service, payment &c. had been completed. —

In these cases he is also liable to an action at the suit of the party injured by his non-appearance. — But to render him liable to this suit, he must be called three times, to appear in Ct. & testify.

When a party sues a witness for non-appearance there is great difficulty in ascertaining the damages. — It seems reasonable, that if the party has lost his cause, & can make it appear that by the testimony of the person summoned he might have gained it, his whole damages should be recovered. —

4 Bl. Com. 359. Ro. Car. 522. Doug. 558. Salk. 278. 2 Hawk 430 &c. At Com. law, no witnesses were allowed the prisoner in a prosecution for a capital crime: for could they be sworn till the Stat. of Anne; tho they were before that Stat. permitted to be examined without oath. —

Evidence.

Witnesses for criminals were always examinable on oath in C. They are summoned at request made by the prisoner, however distant they may be; & were formerly paid out of the State-treasury, as they now* are if the prisoner is acquitted. But if the prisoner is convicted & sent to Newgate, the witnesses are paid from the profits of the nails made in that prison.—

Ibid. 407.—
*in certain cases

A sub-poena with a duces tecum commands the witness to bring certain papers, which the party summoning has a right to see.—

Of Depositions.—

It is a general rule of com. law, that depositions are inadmissible. Yet in some cases, depositions de bene esse (which are depositions taken on a bill filed in Ch.y.) have been admitted in Cts. of com. law. But it seems that this was never done without consent of parties—

Barn. Not.

1. Atk. 445.
1. Mod. 283.
1. Salk. 280.
Bul. N. P. 239.
2. Salk. 591.

So, if the witness is dead, or upon search cannot be found, or, if he falls sick & cannot attend the Ct. his deposition has been admitted.— So if the deposition has been used in Ch.y. & the suit at law is for the same cause of action, it has been admitted.—

In Eng. it is a general rule, that depositions are the only evidence admitted in Ch.y. But witnesses are sometimes heard, as when bending a suit in Ch.y. it is necessary to prove some fact, not to be contemplated, & there is no opportunity of taking depositions.

Depositions to be used in Ch.y. are taken before certain commissioners appointed for that purpose by the Court itself—

1. Vern. 105. 331. 2. Ab. 159.

In ordinary cases, depositions cannot be taken, till after suit commenced. But the Ct. of Chy. in Eng. by virtue of a dedimus potestatem, may permit a deposition to be taken when there is no suit pending; & this is called a Deposition in perpetuam rei memoriam. There must, however, be some particular reason, & this indulgence will not be granted, as that the witness is going abroad, or is old & infirm, & likely to die &c. — These are also called depositions de bene esse. —

By stat. in C. the power of granting a dedimus potestatem is vested in the Sup. Ct. — But, after taking a deposition in this manner, if the person taking them, can himself bring the suit in which they are to be used, he must do it within a year. —

In C. depositions & viva voce testimony are used indiscriminately in Cts of com. law, & Chy. — Depositions may be taken in any case where the witness lives more than 20 miles from the place of holding the Ct. or if he lives within dis tance, if he is sick or unable to attend. — If the adverse party, or his attorney lives within 20 miles of the place of caption, he must be notified to attend. —

Evidence.

Of written testimony.

The highest kind of written testimony is the Stat. or acts of the legislature. General or public Stat. need not, either in Eng. or C. be adduced in evidence. Private Stat. must be proved. If their existence is disputed the only proper evidence is a copy from the original record, under the seal of the legislature. And tho' a copy is not evidence of so high a nature as the record itself it is always admissible, because the record itself cannot be produced.

4. Feb. 70.
Ford. 2. a.
10 Co. 92.

If a copy is not under the seal of the C. the presumption is, that it is not authentic. But on proof that the C. has no seal, a certificate from the proper officer is received.

If an action is brot on a penal Stat. & the deft. wishes to avail himself of another Stat. to avoid the penalty, the latter the general must be pleaded & cannot be given in evidence under the gen. issue. But a proviso in the same Stat. may be given in evidence under the gen. issue.

Ford. 2. a. b.

Customs must always be proved, & in Eng. pleaded.

The laws of another State or country, must be pleaded & proved. The com. law of Eng. is presumed to be the law of another State; & the burden of proof lies on him who contradicts this presumption.

Copies of laws, printed by authority of government are proof; other printed copies are not.

Office-copies & certificates from the proper officer, are entitled to full credence if without a seal, if signed & certified to be a true copy by the officer. If the proper officer is absent another person may take a copy, but his certificate that it is a true copy is not proof; he must swear that he has

Ld. 74 Dr.
2 Dw. 234.

examined the record, & compared the copy with it, & that it is a true copy. —

When an instrument or fact has no efficacy without being recorded, no proof that it was not recorded can ever be admitted, as, in the case of a judgment of a Ct. it will never be admitted to be proved that a judt. was rendered, but not, but upon record. In such case the record itself must be produced or a true & attested copy. — But if the instrument &c. is efficacious without being recorded, tho' by law, directed to be put upon record, (as is the case of a deed in Ca.) evidence may be adduced to shew that it was not recorded, & then other evidence, than the record, may be admitted as proof. — So that a distinction is to be observed between a
2. Sw. 234. record, & a thing recorded: In the former case, the original exists only on record; in the latter, the original is a thing distinct from the record, & in certain cases may be proved without the record.

Salk. 290. con. On these principles it seems, that a copy of a recorded deed is not admissible, unless it be proved
2. Sw. 240. that the original is lost or destroyed: for, the copy of the record is never as high evidence as the original
Tod. 349. deed itself. But the Supr. Ct. in Ca. have decided that a copy of the record is in any case sufficient. —

Salk. 281. Records or registers of marriages, births, deaths,
Ep. 70 A. &c. are proof, & a copy is suff.t. —

A judgment of Ct. is evidence in a cause between the same parties. — So, a Verdict of Jury, tho' no
Ep. 730 judg.t has been rendered thereon, may sometimes be
1. Stra. 68. improved in evidence. — But it must be between the
3. Mod. 141. 2 same parties, & on the same point. Or, if the parties in the suit in which it is offered were privy to the one in which the verdict was given, & had an opportunity of cross-examining the witnesses it is admissible. —

Evidence.

Carth. 79.
2. Vent. 72.
2. Dunf. 367. 8.

The petition and answer in Ch.y are evidence ag.t the parties respectively filing them, in any other cause.

2. Vent. 76.
3. Mod. 239.

The petition or answer of a guardian or prochein ami is not evidence ag.t the ward or infant.

1. Sid. 221.
Eq. 739.

Affidavits made before a Ct. of Law in one cause may be improved as evidence ag.t the person making them, in another: And in some cases they may be made use of to affect persons not parties to the cause.

4. Dunf. 290.

But the declaration & allegations of a party in a Ct. of Law are no evidence ag.t him in another cause.

Eq. 741.

When a Record is counted upon in a declar.n or any of the pleadings, & the existence of the record is denied in the plea of nul tiel record, the question whether such a record exists or not must never be put to the Jury, for the Ct. are to determine it upon inspection. But if a record is adduced to prove a fact, it may go to the Jury with the other evidence.

1. Stra. 78.

In what cases Deeds must be produced as Evidence.

Bul. N.P. 247.
Eq. 789.

Generally, a person claiming title under a deed must produce it as evidence, and when declaring upon it, must make a profert of it.

10. Reb. 93.
Co. Lit. 225.
3. Dunf. 151.

But, if the person wishing to take advantage of a deed, is not entitled to the possession of it, as is the case with a tenant by dower, he need not produce the deed, but may resort to other evidence to prove his title.

4. Dunf. 320.
3. Id. 151.
Stud. 227.a.

So if deeds have been burned or otherwise lost or destroyed without the fault of the owner, parole proof is admitted to prove the contents, and in this case, the deed may be pleaded, to be lost &c. without making a profert of it.

If, in C. deeds are taken, & thro' collusion not recorded, the title is not good ag.t a subsequent bonâ fide purchaser; but as between the parties it is valid, & consequently the land is liable to be taken by the creditors of the first purchaser. In this case parole evidence may be adduced to prove a conveyance, tho' the deeds were not recorded. And to prevent any difficulty in procuring proof of the conveyance at a future time, applic.n may be made in Ch.y to obtain the deeds. –

4 Ved. 349.

Proof must be made out of the execution & also of the delivery of a deed. For this purpose the subscribing witnesses to the deed, (if there are any, and by Stat. two are necessary in C.) are the proper persons. If they cannot be had, this proof may be made out by other circumstances, as, the possession of the deed by the grantee is prima facie evidence of the delivery &c.

4 Ved. 348.

If one party produces a deed & the other party wishes to take advantage of it he need not prove its execution &c. for the producing it by the other party is a tacit acknowledgment of its authenticity & validity. But the party first producing it may in this case impeach it for fraud &c. –

5 Durn. 388

2 Durn. 41.

If deeds are in the custody of the adverse party, & he refuses to deliver them, every thing stated by the party entitled to them, will, in a civil action be taken for truth; but the party claiming them must prove them to be in the others custody. –

But in an action on a penal Stat., or in a criminal prosecution, nothing will be presumed ag.t the deft. from his refusal to adduce evidence, proved to be in his possession. –

4. Reb. 92.
1. Mod. 4. 206.
4. Bur. 2489.

Evidence.

Ld. 349. If any, the least, alter.n is made in a deed by the obligee, the deed is void. So, if an alter.n is made by a stranger in a material part. Otherwise, if an alter.n is made by a stranger in an immaterial part.

11. Rep. 27. If an alter.n is made, in a deed by the obligee, in a material part, with a design to defraud, it is forgery.

In C. Seals are of no importance. But in Eng. when the right of recovery is founded on the deed, sealing is essential. The Ct. in Eng. will not suffer a deed to be given to the Jury, if the Seal is broken off before it is produced in Ct. however the breaking may have happened. But, if the Seal is broken after, viz. the deed may be given in evidence.

Palm. 403. 5 Reb. 23. 119. Bro. Ev. 120. When land passes by feoffment, the deed taken for the delivery the evidence of the transfer may be given in evidence tho' the Seal be broken. And as land now passes by the delivery of the deed, the breaking of the Seal does not prevent it from being given in evidence.

Ld. 175. 251. Formerly, if one only, of two or more joint-obligors was sued the joint obliga.n could not be given in evidence. For the objection must be headed in abatement or not at all.

Of the Law-Merchant.

This is not the municipal law of any particular country; but prevails in the different countries in Europe, the European settlements in all parts of the world, & in the United States.—

The Law-Merchant was formerly considered as a custom in Eng., & tho' still called so, is not treated as such, but as the common law of the land.— It consists of a system of rules applicable to a certain description of transactions, & not, as was formerly supposed to any particular class of men; thus it regulates all mercantile transactions & not all merchants.— There are customs at particular places different from the general law merch.t; & these like customs in the Com. law, must be proved. But the mercantile law itself, is never proved.—

3. Burr. 1686.

Some of the most prominent differences between the Com. law & the law merchant are the following.—

By the Com. law, some consider.a is necessary to the validity of a cont.— by the law merch.t a cont. may be good without any consider.a whatever.—

Fraud in the consider.a of a cont. by the law-merch.t vitiates it; even the concealment of a fact in some instances, renders it void.— At Com. law, fraud in the execution of a cont. only can be taken advantage of, to disannul the contract.—

By the Com. law a man can never be subjected to the payment of a debt, unless there has been a privity of cont. between him & the creditor, or unless he has been guilty of some neglect of duty in consequence of which the debt has arisen.— But by the law-merch.t an obligation to pay may be created without either of these requisites, as in case of an acceptance of a bill of exchange for the honor of the drawer.—

Vid. 3.

Law Merchant.

2 Bl. Rep. 1235. By the law merch.t a voluntary escape on the part of the creditor is no discharge of the debt, as it is at com. law. Neither is a release to one joint-obligor a discharge as to the other.—

A sale, by the com. law, whether the goods be delivered over into the hands of the vendee or not, vests it absolutely in him: but the law merch.t gives the vendor power over it until it is actually in the possession of the vendee, or until he has so far exercised his right over it as to make a sale of it. Therefore if the vendor, after having sent goods to the vendee discovers him to be in failing circumst.s he may stop them in transitu.—

In certain cases under the law merch.t parole testimony has been admitted to contradict or vary a writing; this law however is questioned.—

A factor who is a servant or agent appointed under the law merch.t to sell goods in a foreign country has a lien upon the goods in his hands, for all his demands upon his principal. No such lien exists at Com. law in favor of a servant or agent.

Of Bills of Exchange.

2. Burr. 670
Gilb. L.C. 81. &c.

A Bill of Exchange is a written order addressed by one person to another, desiring him to pay over money to a third person named in the bill. It differs from a common order in this, that it is payable not only to the person named as payee, like an order, but to any other person whom the payee may appoint; or, in the words of the bill "to the payee or his order."

Ante. 250.

The manner in which the payee makes this appointment, is by an endorsement on the back of the bill, which may be either an express order to the drawee to pay the money to some particular person, or it may be a blank endorsement which is barely the payee's name, & operates as an order to pay it to any person into whose hands it may regularly come.

3. Burrow. 1777 arg.
Doug. 611. Peacock v. Rhodes.

After a blank endorsement the bill may be negotiated merely by delivery, it not being necessary for any subsequent endorsor to put his name upon it; but it is usual for them to do it, as it adds currency to the bill by making it more secure.

Kyd. 60.

Where there is a blank endorsement, the endorsee may write over the name of the endorsor, what direction he pleases relative to the bill: he may direct the drawee to make payment to himself (the endorsee) or his order; he may direct payment to be made to himself as attorney &c. to the endorsor, or he may write a release. And no parole evidence can be admitted to contradict such endorsement.

Doug. 67. (639.)
611. (633).
496. (514.).
1. Sal. 125. 126.
2. Ld. Ray. 871.
1. Show. 163.

A bill payable "to the order of A" bears the same import as one payable "to A or order;" & A may, in this case, himself maintain an action on the bill.

2. Show. 8.

Bills of Exchange.

1. Ld Ray. 180.
1. Salk. 124.
3. Bur. 1516.
1. H. 452.
1. Bl. Rep. 485.
Kyd. 58.

A bill payable "to bearer" was formerly considered as not negotiable, but it is now settled otherwise, & such a bill is negotiated by mere tradition without any endorsem.t

2. Wils. 353
3. H. 211.
Hardw. 288.

When a bill is payable "to A" merely, without the words "or order," "or bearer", A only can sue, & it is not negotiable.

When a bill is made payable "on sight" or, "in so many days after sight" the day on which it is presented is construed exclusive, & a paym.t on the next day, answers the tenor of the bill.

Usance is a term made use of in bills of exch.e to express a certain number of days, which, however, is different in different countries. In this country & in Eng. it is thirty days. A bill payable at usance is payable at the usance of the country where it is to be paid, & not that of the place where it is drawn.

2.d Ray. 743
4. Burr. 1948.
1. H. 16.
Folese. 375.
Kyd. 2-5.
2. Ong. 62.
Bul. N. P. 274.
4. Ci. 258. a.

Where a bill is made payable at a future day certain, or at so many days after date, an additional number of days, called days of grace are allowed for the payment of it. These, also, vary in different countries. In Eng. 3 days are allowed. Thus, if a bill is drawn payable on the 1.st day of Jan.y a payment on the 4.th of Jan.y answers the tenor of the bill. If the last day of grace, falls upon Sunday, the bill must be paid upon Saturday. This is not the case upon an instrument regulated by the com. law, there a paym.t on Monday would answer.

2.d Ray. 743.

Kyd. 4.

In the comput.n of time according to the law merchant, a month is reckoned by the calendar. At com. law, a month is four weeks.

Bills of Exchange. –

5. Co. 1. Cro. Ja. 135. 5. Co. 94. Co. Lit. 46. b. Cro. Car. 94.

Much time has been spent in the Eng. Ct. upon the meaning of the terms "from the date" & "from the day of the date". The received opinion, however, was that the former included, & the latter excluded the day on which the instrum.t bore date, on the ground that the terms "from the date" imported from an act done, & it is a rule in such cases that the day on which the act was done shall be included. – But it is now settled that these are convertible terms, & that they shall be construed inclusive or exclusive of the day of the date, as will best promote justice & carry into effect the intent of the parties. –

Cowp. 714. 3. Durn. 623.

Chipman.

It has been questioned of late, whether a promissory note payable "to A. or order, or bearer" is not negotiable at Com. law. – It has, however, been decided, both in the U. S. & Eng. that such notes at Com. law are not negotiable. – Promissory Notes are made negotiable by a Stat. Anne. –

Salk. 129. 2 Ld. Ray. 757-9. 7 Vid. 168. b.

The maker of a promissory note answers to both the drawer & drawee of a Bill of exchange, & is liable in the same manner, that both of them are. Bills of exch.e & proms. notes do not resemble each other in their creation, but after the latter has been endorsed over it perfectly resembles the former, & the law is the same with regard to both. –

Bills of Exchange.

1 Show. 123. Any person capable of binding himself by a
Carth. 82. special contract may make a bill of exchange or promissory note. An Infant may bind himself by a note not negotiable, or he may be bound by it, altho' negotiable, if not negotiated. But by a bill of exchange he is never bound, as it is a specialty from its creation, & the consideration not enquirable into.

Kyd. 20 Bank notes, bankers cash notes, & draughts on bankers are considered as cash, & the person who obtains them
1 Bur. 452.7 bona fide, will hold them at all events, tho' they may
1 Term. 554 have been stolen or procured fraudulently in any way.
Ld. 130.6. 161.a.

Kyd. 82 Bankers notes, however, tho' considered as money to many purposes, differ from cash & bank notes in this: That
Doug. 515. if the banker who gives them, happens to fail, the holder
Str. 415. 410. may come back upon the person from whom he received
530. 910. 1175. them, if he has done his duty, by presenting them for
1248. payment, within a reasonable time after receiving them.
1. Bl. Reb. 1.
Beawes 482. What this reasonable time is, is a matter of uncertainty; it can be best learnt from the cases themselves.
1 Term. 169. It is, however, a matter of law, for the Court to judge of, & not of fact, belonging to the Jury.

Bills of Exchange.

Vid. 203.b.
Kyd. 32. &c.
2. Stra. 1271.
Bul. N.P. 273.
3. Wils. 213.

+ Of the requisites to a bill of Exchange &c. There are 1. That it be for the payment of money & not for any collateral thing: — And this applies equally to bills of exchange & promissory notes. —

10. Mod. 294. 310.
3. Wils. 207.
1. Stra. 591.
2. Ld. Ray. 1361.
2. Stra. 962.
2. Ld. Ray 1481.

2. A bill of exch.ge must depend upon the personal security of the ~~drawer~~ parties & not upon any particular fund; as, if it depended upon a fund, & that fund should fail, it would not be binding or payable at all. — If, however, a fund is mentioned in the bill, not as being one out of which the bill is to be paid, but merely from which the drawee is to reimburse himself, the bill is notwithstanding good, for the parties are still, personally liable & holden. —

Ld. Ray. 1545.

Promissory notes, whether made payable out of a particular fund or not, are negotiable, as the maker is always, personally holden. —

1. Bur. 323.
2. Stra. 1151.
Ld. Ray. 1503. 1590.
1362. 1396.
2. Stra. 1217.
1. Bur. 227.
1. Wils. 262. 3.
Stra. 24. —

3. The payment must be certain, at all events, & not depending upon a contingency. — And this applies both to bills of exch.ge & promy. notes. — 5. Durn. 482. If the event on which they become payable is one that will certainly take place, they are good. — Even, if it depends upon a moral certainty it is sufficient. —

Kyd. 38.
Elb. 28.
2. Bl. Rep. 1072.
5. Durn. 485.

But, tho' some of these requisites are wanting, it does not follow of course, that the bill &c. is of no effect. for, altho' it is not a negotiable instrument by the Law merchant, it may be good evidence of a contract at com. law, on which an indeb. ass. will lie ag.t the acceptor. —

Vid. 203.b.
Kyd. 155. 3. Durn.
80. 83. Kyd. 150.
1. Bl. Rep. 445.
3. Durn. 454.
Doug. 635.
SS. Vid. 709.

+ Neither fraud, nor illegality will vitiate a bill of exch.ge &c. in the hands of an innocent indorsee, except in some special cases, as where the holder receives it after it was due, unpaid, or non-payment; or perhaps where it is not notes. —

Bills of Exchange &c.

1 Str. 029. 706.

No precise form is necessary to constitute a good bill or note, if it is apparent that it was the intent of the parties that the instrum^t should be negotiable.

Stra. 204. 1212. con. 2 Ray. 1556. 1. Show. 5. 497. 8. Mod. 207.

And it is now settled, that the words "for value received" are not necessary in either.

Of the Acceptance.

There is no express acceptance of a Note, the making it being an implied acceptance.

Kyd. 45. 3. Bur. 1674. Stra. 648. 1000. Lock. 127. 2 Ray. 304. 574. 1. Atk. 617. 717.

An acceptance of a bill may be written, or by parole; & a written acceptance may be either on the bill itself, or on a distinct paper.

A verbal acceptance has been adjudged to be not within the Stat. of frauds. For the acceptance is presumed to be an undertaking for the debt of the drawer himself, he being presumed to have effects of the drawer's in his hands. And this presumption, as between the drawee & holder, cannot be rebutted; as between drawee & drawer, however, it may.

3. Durn. 409. 3. Bur. 1666. Id. 261.

An agreement by the drawee "to accept" made before the bill is drawn, is binding upon him. But it seems, it is not binding unless there exists other circumstances which may have induced a third person to receive the bill; as, if the promise of the drawee has been shewn to the receiver of the bill.

3. Bur. 1663. Kyd. 49. Stra. 1211. 1. Show. 417. Doug. 280. (299). 2 Ray. 1556. Cowb. 572.

Lyd. 48. Salk. 129. Bills may be accepted after they have become due.
3. Bur. 1663. & tho' the acceptance cannot be "according to the
Doug. 284. tenor of the bill" yet, if it imports so to be, it is good.
1. Stk. 011.
2. Ray. 364.

If a bill is not presented for acceptance until
1. Str. 214. after the time of payment, if the drawee accepts it
11. Mod. 190. he will be liable, as on other cases, but if he does not,
the holder cannot resort to the drawer, because he
has not given him notice of the non acceptance at
the proper time. —

3. Bur. 1074. & Stranger, after the drawee has refused to accept,
Lyd. 97-8-9 — may accept a bill for the honor of
Beawes. 450-8. the drawer, & thus make the ~~drawer~~ latter an involuntary
debtor. The drawee may also accept in the same man-
ner & thus entitle himself to an immediate remedy
against the drawer, without the hazard & delay of an enqui-
ry as to any previous indebtedness on his part. —

1. Str. 214. The drawee may accept the bill as to part only,
2. Ib. 829. if he chooses, or he may accept it to be paid at a greater
Lyd. 49. 103. 4. length of time, or to be paid in part goods, & part money,
or the whole to be paid in goods &c. Yet, in all these cases,
where the bill is not accepted according to the tenor,
the holder is not obliged to consider it as an accepta-
nce; he may have the bill protested, & resort to the
drawer as tho' there had been no acceptance at all.
1. & 2. Durn. 182. But by doing this he waives the acceptance entirely, & the
acceptor is not liable to him on such acceptance. —

2. Str. 1152. So, an acceptance may be conditional, i.e. the bill
2. Wils. 9. is to be paid, if such an event takes place, &c. and this
1. Durn. 182. the holder may regard as no acceptance &c. as in a last case.

But if the acceptance is written, the condition
Doug. 280. must also be written & annexed to it that subsequent
indorsees may see upon what terms it has been accepted.

An acceptance by a clerk is binding on the master, if
Beawes. 462. the clerk has been accustomed so to do. So, the acceptance of
an attorney binds the principal, if he was authorized to
transact the business.

Bills of Exchange.

Feb. L. Ca: 118.
Beawes. 455.
Kyd. 53.
3. Burr. 1674.

A promise to the holder to accept at a future time if it be not qualified with any circumstances, implying a condition is considered as a present acceptance & of course is binding. But if there is any condition mentioned, it must be strictly complied with, or such an acceptance is not binding.

Doug. 284.

Kyd. 53.
Beawes. 455.
Comb. 401.
1. Durnf. 209.

Any thing indorsed by the drawee on the bill is construed to be an acceptance unless it amounts to a refusal. — 2u. 1. Stk. 511.

As to what will discharge an acceptor vid. p. 200. b.

Beawes. 470.

If the drawee loses a bill that is left with him for acceptance, it is his duty to give the holder a note for the same sum; & this note has all the qualities of a bill of exchange; if it is not payed at the proper time, a protest must be sent to the drawer &c. — If the drawee, in this case, will not give such a note, the holder must protest to the drawer, stating the loss of the note, & when he sues the drawer, must make out his proof of the existence of the bill, by parole testimony as well as he can.

Tit. 252 b.

Of the Indorsement & Negotiation of a Bill of Exchange.*

3. Durnf. 177.

On a bill payable "to bearer," which is negotiated merely by delivery, without any indorsement, the acceptor & drawer only, are liable by the law merchant. But, at com. law, the person from whom the bill was immediately received, is liable to an action of indeb. ass. upon failure of payt. on the bill. — In this instance, therefore, as the proceedings are at com. law, it ~~would~~ is necessary for the holder to shew a consideration, given by him for the bill, to the person from whom he received it, before he could sustain the action agt. him. — So, on a bill payable "to B. or order" (which

3. Lev. 757
2. H. 42.
Kyd. 155.
Doug. 514.

Kyd. 90. Salk. 128. 4. Dunf. 29. 33. 3. Ld. 181. — is transferable by delivery alone, after having been indorsed by B.), if B. is the only indorser, altho' it may have passed thro' a number of hands, he is the only person (except the drawer & acceptor) to whom the holder, by the law-merchant can resort: Yet at com. law he may look to the person from whom he had it immediately, but must shew a consideration. —

1. Dunf. 80. 1. Bl. Rep. 485. A bill of exchange may be indorsed over, & negotiated at any time, either before or after the acceptance; & they have sometimes been indorsed before they were drawn, or at least before the sum for which they were drawn, was inserted. — Doug. 450. In such a case the indorser is liable to any amount that may be inserted: — And where 1. Henry Bl. 313 the maker of a note put so much confidence in the payee as to write his name blank, & suffer the payee to write the note over it, he was holden to the full amount. —

Ibid. 258. 2 Bur. 674. Doug. 654. The holder of a bill which has been accepted, must first resort to the acceptor for payment: if he refuses paymt. the holder then becomes entitled to an action agt. every person whose name is on the bill, either as drawer, acceptor, or indorser. — He may sue any or all of these 2 Bl. Rep. 1235. at one & the same time; a suit agt. one being no bar to an action agt. another; and nothing but an actual receipt of the money discharges their liability. — 2 Bur. 1220. If he sues an indorser & recovers, he, the indorser immediately becomes entitled to an action agt. the drawer, acceptor, or any of the prior indorsers, but a subsequent indorser never becomes liable to a prior one. —

Kyd. 107. 5 Ray. 443. Salk. 127. 313. Doug. 654. Bur. 674. It is now settled that a holder is not obliged to resort to the drawer, before he can come upon the indorsers: neither is he obliged to sue the acceptor, tho' he must demand payment of him. —

Bills of Exchange.

Sha. 457.
Com. Rep. 311.
2. Bur. 1216.
1207.
1 Bl. Reb. 295.
Hyd. 9.

The negotiability of a negotiable bill cannot be limited by an indorser, unless he indorse in such a manner as to make it appear from the face of the bill that he has not sold or assigned his property in it. Therefore if the bill is payable "to B or order," & B. indorses it to C omitting the words "or order," tho' it is negotiable, & payable to C's order, for the indorsement always follows the nature of the bill. — But if it appear

Doug. 57. (34.)

that the indorsement was not made with a design of transferring the bill, as if the indorsement were by B. to C. for his (B's) use, it would be no longer negotiable. — So, if the

1. Burr. Bl. 89.

drawer himself takes up the bill or note, it destroys its negotiability. —

Hyd. 9.

A bill payable to B. for the use of C. cannot be

2. Show. 509.
Carth. 5.
Ld. 103. b.

endorsed by C. the cestui que use — B. the legal owner is the proper person either to endorse it, or bring forward a suit upon it. And yet a release from C would be good.

1. Bur. 452.
3. Ib. 1516.
Doug. 91.

If a bill payable "to bearer", or one payable "to order" if indorsed blank, be stolen or lost, or in any way comes fraudulently into the hands of a person, who afterwards passes it bona fide to another person, this last shall recover upon it. This rule is founded on motives

Salk. 126.

of policy, that the circulation of bills of exchange may not be impeded, by the fear that they may have been stolen, or obtained in any way, mala fide. —

1. Salk. 130.
Salk. 65.
Carth. 466.

A bill of exchange cannot be indorsed over, for a part of the sum for which it is drawn, as it might subject the drawer to a number of suits upon a single instrument. —

1. Stra. 510
3. Wils. 5.
Beawes. 409.
3. Wils. 1.
2. Stra. 1260.

If a bill is made payable to a feme covert, she cannot indorse it, but her husband must do it. —

Where the payee dies, his Exr or Admr may indorse it. So, a bill may be indorsed to them, as Ibid.

Doug. 630. note.

If the bill is in favor of partners, the indorsement of one is suff.t but if they are not partners, both or all should make the indorsement.

The indorsement of a bill of exchange by an Infant, is so far operative as to transfer it to the indorsee, but he is not himself liable upon such indorsement. — All the other parties to the bill however, are liable in the same manner as in other cases. —

Engagements of the parties.

The drawer of a bill of exchange impliedly makes the following engagements to the payee, & every subsequent holder of the bill. 1. That the person upon whom he draws is capable of binding himself by acceptance.

Kyd. 88.
Beawes. 409.

2. That he is to be found at the place where he is described to be, & at the time on which the bill is payable. 3. That he will accept the bill when presented. 4. And that he will pay it at the proper time. — And, if any of these implied engagements fail, provided the holder does his duty by duly giving notice &c. the drawer is liable to the payment of the bill, interest, costs, & sum in damages. The sum in damages is fixed at a certain rate, according to the distance &c. of the parties. — Between Eng. & the U. S. it is 20 pr. cent. —

Bills of Exchange.

Kyd. 71.
Doug. 55.
3. Wils. 18. 70.
2. Stra. 949.
2. Lev. 107.
Bull. N. P. 269.

On non acceptance by the drawee, or failure of any of the above implied engagements, the drawer becomes immediately liable; the holder is not under the necessity of waiting till the payment of the bill becomes due.

3. Mod. 80. 4 case was reversed.
2. Show. 441. q.
Kyd. 100. 140.
2 B. & P. 1235.
4. Durf. 472.

Every indorser is as to the subsequent indorsees as a new drawer, & is liable upon the failure of any of the above engagements. And nothing discharges the liability of the indorser, but an actual payment of the money to the holder. But if an indorsee re-indorse to his indorser, the latter cannot recover of the former, except under special circumstances, specially stated.

Id. 250. b.

If the steps to be taken by the holder to subject the drawer, indorser &c.

Kyd. 78.
2 Ray. 743.
Stra. 829.
4. Durf. 173. 4.

The holder must, in order to entitle himself to a remedy agt. the drawer or indorser, present the bill within the time, or as soon as it becomes due, for acceptance, & whether accepted or not must also be presented for payment, if it be a bill on which days of grace are allowed, it is suff. if it be presented within the days of grace. Qu. Is not a demand on the fourth day early enough?

4 Durf. 173.

2 Stra. 829.

If the bill is payable on sight, the holder must present it within a reasonable time.

If the drawee refuses either acceptance or payment the holder must give notice to the drawer, or have no remedy agt. him. And if he intends, in this case, also to render the indorsers liable, he must give them notice; for no person is made liable unless he has had notice.

K. 2. 79.
Stra. 44. 515.
2 Bos. & P. 247.
1 Durf. 170.
Id. 272.

The reason why notice is made thus particularly necessary to the drawer, is that the law always presumes that he has effects in the hands of the drawee; & an unqualified or general acceptance of the bill by the drawee is so far presumptive proof of this fact, that if he sues the drawer for the sum paid on a bill of exchange, he must prove that he had no effects before he can be entitled to a recovery. Now, as this is the presumption that he has effects, if he refuses to pay the bill, notice of this must be given to the drawer, that he may withdraw his effects out of the hands of the drawee; for, if this notice is not given, the drawer will make his calculations upon the idea of the bill's being paid by the drawee; & thus if the bill is not paid & the drawer does not know it, & the drawee becomes a bankrupt, the drawer loses the effects which he had in his the drawee's hands. As this is the ground for the necessity of notice, if the drawer in fact, had no effects in the drawee's hands, he is liable to the holder without any notice. But this fact, that he had no effects, must be proved by the holder. And, even in this case, if it so happens that the drawee, altho' he had no effects, has actually sustained damage by the want of notice, no recovery can be had ag.t him.

3. Durn. 409.
1. Wils. 185.
Doug. 249.
1. Durn. 410.
2. Ib. 704.
5. Ib. 239.
Doug. 239.
1. Durn. 713-14.

The reason for the necessity of notice to the indorser, is that he may secure himself by a suit ag.t the drawer, who, if not sued soon, might become a bankrupt. And an indorser who has been notified may sue the drawer before any suit has been commenced ag.t him (the indorser) by the holder of the bill. And the indorser, before he can be made liable must have notice, whether the drawer had effects in the drawee's hands or not.

Kyd. 83.
1. Durn. 714.

Bills of Exchange: —

Where an indorser, who had not received notice made a subsequent promise to pay the bill, the Ct held this promise not to be binding, as he had made it being ignorant of his rights, supposing himself obliged to pay the bill whether he had notice or not.

5. Bur. 2670.
1. Dunf. 72.

When a bill is accepted variant from the tenor thereof, notice must be given, if the holder means, in any event to resort to the drawer. —

The holder must himself give the notice of non-acceptance &c. & in case of non-payment after acceptance he must also inform the person or persons on whom he intends to make the demand, that he shall look to them for payment.

2. Bl. Rep. 747.
1. Dunf. 170.
Ky. 80. 86.

Of the Manner of giving Notice.

This on foreign bills is by protest. On inland bills no particular form is established as necessary. —

The method by Protest is this. After the drawee has refused acceptance, the bill is to be delivered to a Notary-Public or if there is no notary public to two or three respectable men of the place who himself demands acceptance of the drawee, & if he refuses the Notary notes it upon the back of the bill with all the circumstances, the time &c. — He then draws up a protestation stating all these facts & the intention of the holder to look to the drawer &c. for all damages that may ensue: — In no

Beawes. 402.
400. 440.
Bul. N.P. 271.
Mar. 15.

1 Burr. 100. let together with a copy of the bill must be for-
warded to the drawer, by the first post. — Afterwards
2 Burr. 714. on the day of payment, the same ceremonies must
Kyd. 77. 84. 87. be gone thro' only demanding payment instead of accep-
tance; and after a refusal of payment, it is necessary to send forward the bill itself, not a copy: but it is usual to send it to a correspondent of the holder, with orders to lay it before the drawer, & not to the drawer himself, in order that the holder may retain the bill to found his action upon. — And, this last it is necessary to send to all the indorsers whom the holder means to render chargeable. —

So, if a bill is accepted, variant from the tenor a protest must be made out & sent. —

Altho' a protest is not necessary on inland bills,
1 Burr. 107. yet notice of some kind must be given, & that within
Beawes. 440. a reasonable time. — And by a Stat. in Eng. if notice
Kyd. 90-95. is given on an inland bill by way of protest, the holder
2 Str. 910. shall be entitled to recover, not only interest & costs, but also damages as in an action on a foreign bill. —
2 Burr. 1080. Interest is computed up to the time of the judg.
2 Burr. 52. in this as well as in other cases. —

If the holder of a bill, finds, before the
Kyd. 79. 88. time of payment, that the drawee is likely to fail,
2 Lay. 743. he must, in order to subject the drawer, request of the drawee, security for the payment of the bill, & in case he refuses, must give notice to the drawer, & protest, & this is called a protest for better security.

Bills of Exchange.

Kyd. 88. 98. Beawes 457. 458. 459. Mar. 17. — If A. draws on B., to pay "on account of C." the drawee may refuse to accept it on C's account, but may accept if for the honor of A. the drawer. So, if a bill has been indorsed before acceptance, the drawee may refuse to accept on the account of the drawer, but may accept for the honor of an indorser, and that indorser, in this case, & all previous indorsers are liable to the drawee, if he pays the bill. — But in both these cases, a protest must be made & sent to the drawer, & this is called a Supra protest. This kind of protest may be made by the acceptor himself.

In ordinary cases, the drawer is not liable to the drawee, as the latter is supposed to have effects of the former in his hands, suff.t to reimburse himself for the paym.t of the bill. But, if he has no effects, or otherwise, the acceptor accepts for the honor of the drawer; in that case he is not presumed to have effects of an indorser, the person for whose honor he accepts is always liable to him in an action.

1. Wils. 185. Doug. 249.

Doug. 235. 2. Str. 8. 249.

The holder may discharge the acceptor from his liability, by express agreement, tho' it is not necessary that there should be any consideration to this agreement. But the acceptor is never discharged by the holder's resorting to the drawer &c. nor by holder's actually receiving part payment from the drawer. — A receipt of part, however, from the acceptor discharges the drawer & indorsers. — And, in one case it is held, that a receipt of part from the drawer discharges the indorsers. sed qu.

Str. 1. Wils. 202. Str. 33.

A receipt of part from an indorser, by the holder, neither discharges that indorser, or any other person who is liable.

In Eng. it has been held themselves bound, by a decree of a C.t in Italy, which permitted an acceptor to revoke his acceptance, principles different from those established in Eng.

Of the Actions on Bills of Exchange. —

Kyd. 114. 117. 1. Bl. Rep. 445. 3. Wils. 207. 3. Bur. 1674. 2. Ray. 21. Hard. 485. 1. Mod. 285.

An action to recover money due on a bill of exchange is bro't on the bill itself; stating it to have been made "according to the custom of merchants" & not declaring upon it as a specially at com. law. It was formerly the practice to state the whole custom at length in the declar.ⁿ i.e. the whole law upon the subject; but now, it is usual to state only that it was made "according to the custom of merchants" &c.

1. Wils. 189. 1. Show. 130. Carth. 83. 270. Kyd. 114. 3. Mod. 226.

A com. law remedy, however, may be had, where there is a privity of contract; as, between payee & drawer, between indorsee & his immediate indorser, between transferee & his immediate transferer, & perhaps between drawer & acceptor; but not between indorsee or transferee & drawer (2u. 3. Burr. 1674. 3. Bur. 1525.) nor between payee, indorsee &c. and acceptor. 2u. 3. Burr. 1674. — May not any bona fide holder of a bill, ~~payable~~ to "bearer" maintain indeb. ass. agᵗ drawer? — Is there not, indeed, in this case, a privity between the drawer & every holder? — In these cases, where the action is at com. law, the plf. recovers only the sum actually paid by him to the deft. for the bill; not, as the case may be, the amount of the bill itself.

3. Burr. 1674. 181. 3. Bur. 1525. 2. Ld. Ray. 930.

2. Wils. 353.

Note, Promissory Notes in Eng. are declared upon "according to the form of the Stat. of Ann." & not "according to the custom of merchants." —

4. Burr. 152.

Kyd. 120. Str. 1146. Bur. 323. 2. T. R. 32. Fitz. 175.

A note with these words "We promise" & signed by one person only, may be sued agᵗ such person signing. —

Cowb. 832. 2. Ray. 1543. 1730.

When one of two or more joint & several obligors is sued, it may be stated, that two &c. signed: but such statement is not necessary. — When obligors promise jointly, & not severally all must be sued. But if one only is sued, in this case, he must plead this mistake in abatement, or not at all. —

Cowb. 832.

Bills of Exchange.

In all actions upon a bill of Exchange, it is necessary to state, that the drawer drew the bill, that he directed it to the drawee, desiring him to pay it to the payee; & that he, the drawer, delivered the bill to the payee. In an action ag.st the drawer, it is also necessary to state, that the drawee refused to accept the bill, or pay it, or both as the case may be; likewise, that it was duly protested, & that the drawer had notice by the first post. The manner in which the notice was given, viz. by protest, should be stated, but if it is only stated generally, that the deft. had notice, altho' it may be taken advantage of by special demurrer, yet it is cured by Verdict.

Doug. 674.

If the actn. is ag.st the acceptor, the acceptance by him must be stated.

If the action is brt. by the indorsee, he must also state that it was indorsed over, & delivered to him, thus shewing, that he has a right to demand the pay.m of it. If there are a number of special indorsements, he must state them all: But, if the indorsem.t of the payee is blank, he may fill it up with an order to pay it directly to himself, altho' it may have passed thro' twenty hands. Or, if there are several blank indors.s, he may erase them all, except that of the payee, & fill that up with an order to pay it to himself.

2 Ray. 574.

After a statement of the facts in the declar.n, it is not necessary by the law merch.t to conclude by raising an assumpsit, "in consequence thereof, he assumed upon himself & promised to pay &c." But the com. law this is necessary, & our Sup.r Ct. have decided the same way, but the reason of it, may be questioned.

2 Ray. 538.
1 Salk. 128.
Carth. 409.
5 Dunf. 145.

1. Bur. 324.
1. Ken. & Bl. 313.
Lyd. 117. 120.
3. Durn. 183.
481. 174.
7 Ved. 262. b.

The declar.n on a bill, must state the bill according to its legal operation; in conformity to the rule that all instruments must be declared upon according to their legal effect: Therefore, as a bill payable to a fictitious person, is considered as a bill payable to bearer it must be declared on as such.

4. Durn. 525.
2 Bl. R. 749.
2. Ved. 115.

The holder as has been mentioned before, (p. 250. b.) may pursue his remedy, against all who are liable to him, at the same time: But if any of the defts. pays the bill & his own costs, & the hol. still takes out ex.n against the others, for any thing more than costs, he is guilty of a contempt.

1. Bro. 515.

For his costs, however, in each action, he may take out ex.n, but for nothing more. — If the bill is paid, & costs in all the suits all proceedings must be stayed. — As the acceptor is eventually liable for the costs in all the suits, proceedings will not be stayed against him, unless he pays the costs of all the suits.

4. Durn. 691.

An indorser can never maintain an action against the acceptor or drawer, on the ground of mere liability; he must have paid the money to the holder, before he is entitled to such an action: For, if this were not the case, immediately upon non-payment every one of the indorsers might immediately sue the drawer, & thus create an infinitude of suits. It is therefore necessary for the indorser in such an action to state & prove that he has actually paid the bill. —

2 Ray. 743.

202.b.

Bills of Exchange.

Of the necessary proof in an action on a Bill of Exchange.

The proof to which the succeeding observations refer, is more particularly relative to the cases in which the hand-writing of the parties to a bill of exchange is necessary to be proved.

In an action by the holder of a bill ag.t the acceptor, the hand-writing of the drawer need not be proved, for the acceptor is supposed to know the hand-writing of his correspondent, & by the acceptance acknowledges it to be a true bill. But, if the acceptor has accepted the bill without seeing it, it will then be incumbent on the def.t to prove the drawer's hand. So the acceptor's hand must always be proved in an action ag.t him.

Comy. 615. 2 Ray. 444. Str. 945. 8.

If the bill is one payable "to A. or order," it is all necessary for the holder to prove the hand of A. the first indorser, for, if that is forged or cannot be proved, he cannot recover. If the indorsements are special, he must also prove them all, in this way shewing his title thro' the whole. If the bill is payable "to bearer" it is not necessary to prove the hand of any person but the acceptor. Upon this ground was determined the greater litigated cases of bills made payable to a fictitious payee, whose name was indorsed by the drawer himself. The Cts determined these cases to stand on the same ground as bills payable to "bearer" & therefore it was not necessary to prove the hand-writing of the indorser.

3. Burr. 127. 1. Bl. 354. 4. Bl. 28-30. 3. Comy. 172. 189. 5. Bl. 483. 4. Bl. 4 Q. 1. 4. Bl. 313. Ibid. 212. a.

In an action ag.t the drawer, by indorsee, the hand-writing of the drawer, & indorser must be proved.

1. Str. 442.

When the action is by the indorsee ag.t the indorser he need prove nobody's hand but the indorser's, for he is, in respect to the indorsee a new drawer.

2 Ray. 1.r. 1. Ld. 127. 2 Burr. 669. 675.

If the acceptor has refused payment, & is sued by the drawer, the latter must prove the acceptance by the deft. either by his hand-writing or in some other way; his refusal to pay. the return of the bill to the drawer, & payment of it by himself. The drawer in this case is not obliged to prove that he had effects in the hands of the drawee; that is presumed from the acceptance. –

1. Wils. 185.

When the acceptor sues the drawer, he must prove the hand-writing of the drawer; the acceptance & paym.t by himself; & that he had no effects. –

3. Wils. 16.

The hand-writing of any of the parties may generally be proved by comparison & similitude; but an indorsement &c. can never be proved to be a forgery merely by this kind of testimony.

2. Stra. 1051.

A confession by any one of the parties that the bill, indorsement, &c. is his hand-writing, is always good proof ag.t the person confessing; but when such a confession will operate ag.t any other person, it is inadmissible; as in an action by indorsee ag.t drawer, a confession by the indorser that it is his hand-writing may not be proved. –

A Protest regularly made, is conclusive evidence. In most countries, the bill itself is not necessary to found the action upon, the protest being sufficient evidence of its existence; but in Eng. it has been held to be necessary, & the same rule would probably obtain here. –

Gilb. L. E. 118. 119.

The putting a letter containing a notest into the Post-Office, is all that is required of the holder. – He is not obliged to use any other means of conveying the notice. –

When a bill of exchange has been made by a clerk, it is necessary, in order to subject the master, to prove that it is his business, or that it is usual for ~~him so to~~ do. –

When a drawer is sued on a bill, if he suffers a default, it is an admission of the existence & ~~reality~~ validity of the bill, & it need not afterwards be produced, unless for the purpose of shewing paym.ts that have been made upon it. –

2. Bl. Rep. 748. cont.
3. Durn. 29.
Stra. 1149.

Wid. 254.

Bills of Exchange.

If the consider.ⁿ necessary to Bills of Exch.ᵍᵉ.

Altho' it is a general rule that contracts are good without a consider.ⁿ by the law-merch.ᵗ there are certain cases in which a want of consider.ⁿ may be taken advantage of in a suit on a bill of exchange. Mr. R. thinks the rule to be this; If the case be such one as may be governed by the com. law, where there is no necessity for resorting to the law-merch.ᵗ to sustain a suit, & this will happen in those cases where there is a privity of contract between the parties, there, a consid.ⁿ is necessary; but if it is a case governed wholly by the law-merch.ᵗ it is good without one. Ex. gr. A. gives a promissory note to B. without any consider.ⁿ & B. sues him upon it, here he may avail himself of the want of consider.ⁿ for this is a com. law action between B. & A. but if B. has indorsed the note to C. & C. sues A. here it is good without a consid.ⁿ for no action at com. law will lie by C. agᵗ. A. —

Wid. 254. Doug. 630.

Illegality of consider.ⁿ as between the immediate parties to a bill is always a good defence; but, when it has been once indorsed & is in the hands of a bona fide indorsee it is no defence, except in the cases of bills which are usurious, those founded on gaming contracts. If these were not held to be void, the stat. agᵗ. those ~~contracts~~ transactions would be rendered completely nugatory. — So, where a bill has been indorsed, after acceptance has been refused upon it, the drawer may take advantage of any illegality in the consid.ⁿ. —

Stra. 1155. Doug. 764.

Where the bill is void for illegality, the indorsee who has paid a valuable consid.ⁿ for it, may sue the drawer of the indorser; tho' not on the bill, yet that may be used by him as evidence. —

Stra. 1155. Doug. 764.

Of Policies of Insurance.

A Policy of Insurance is an instrument founded upon a contract by which the insurer agrees to pay to the insured a certain sum in case the loss happens which he insures agt. For this insurance the insured pays a certain premium, which, however large it may be, is not usurious, because of the hazard run by the insurer.

2. Bl. Com. 460. As between the insurer & insured it is no matter how high the property insured is valued at, if it does not make the contract a mere wagering one. An insurance upon property in which the insured has no interest, is unlawful as it is a mere wager. It is made so in Eng. by Stat., but Mk. supposes that without Stat. it is void, as being contrary to the general principles of the mercantile law.

2 Bro. 301. Thellusson v. Fletcher.

Policies of Insurance are more generally made upon Ships & their freight & cargoes, than upon any other species of property. And these policies are negotiable instruments, & assignable with the property insured.

An insurance may also be made upon the life of a person. But to prevent wagers in this way an Eng. Stat. has provided, that all insurances upon lives are void, unless the person insuring has an interest in the life insured. Insurances of this kind are governed by the com. law, & not by the law merchant.

So, also, are insurances of houses from fire. Here too, it is no matter how high the house is valued, as the owner pays a proportionably higher premium. This insurance is not negotiable, & if the house on which it is made is sold, it does not pass with it, unless there is an express consent or agreement for this purpose by the insurer; for it is a rule, that the insured must have an interest in the house, at the time of making

1. Wils. 10.
2. Atk. 554.

2. Atk. 554.

the insurance, & also, at the time the fire happens.

2 Wils. 303. Where, by the terms of the insurance the insurer was to be discharged, if the house was burnt "by a military or usurped power," & in this case it was done by a mob, he was held not to be discharged.

2. Dunf. 101. Re-assurance which is where the insurance amounts to more than the value of the ship, goods,

2. Saund. 200. &c.) is not permitted by the law-merchant, except where there are underwriters & some of them become bankrupt, insolvent, or die. Therefore, after the subscriptions of the underwriters amount to the sum

1. Show. 133. of the valuation of the property in the policy, any additional subscriptions are void, unless some of the former become bankrupt, insolvent or die.

1. Bur. 489. In case of double insurance which is where

1. Bl. Reb. 103. the same property is insured twice over, by two different policies, the insured can recover upon one only.

2. Atk. 359. Insurance "from" a place, attaches from the moment of departure. If it is "at & from" it covers all losses while the vessel remains in the port, be it ever so long, unless the voyage contemplated & insured, is given up or abandoned. In such case of an abandonment of the voyage the insured cannot recover back the premium from the insurer, altho no risk has been run. qu. Cowp. 668.

Cowp. 668. The general rule is, if no risk has been run,

3. Bur. 1240. the premium must be returned. But, if the risk

Doug. 757. Bermon v. Woodbridge insured ag.t is once begun to be run, the premium is to be retained; except in one instance, when only a part is to be retained; that is where the risk is be

3. Bur. 1237. gun by a vessel sailing merely from one port to another, which is the place of rendezvous, & then the voyage is discontinued. This is on the ground that here two distinct risks are insured ag.t one from the place of loading to the place of rendezvous for the contingent, the other from thence to the port of destination. Ibid. Cowp. 669.

Policies of Insurance.

Beawes. 118. When the term freight is made use of in a policy of insurance, it does not mean the cargo of the vessel, but the earnings, the sum that is paid for the transport.ⁿ of the cargo.

2. Str. 1251. If ship & freight are insured "at & from" a port, & the vessel is lost in port before any part of the cargo
3. Durn. 362. is not aboard the insurer is not liable for the freight; but, if any part of the cargo was aboard, & the rest ready to be put aboard he must pay the whole freight. –

3. Bur. 1394. Money lent on a bottomry or respondentia bond
2. Vern. 209. 717. is not included in a policy of insur.ᶜᵉ under the term "goods" – A person, however, having lent money in this way has such an interest in the vessel that he may insure upon it; but, he must specify in his policy, that the insurance is made upon the money thus loaned. –

Salk. 444. It appears from the authorities, that parole testimony is admitted to explain, & vary a policy of insur.ᶜᵉ – This is clearly contrary to com. law principles, & the justice & policy of the decision may be fairly questioned. – So, if the
1. Atk. 545. policy has, by mistake or accident, been drawn up variant from the statement of the force, capacity &c. of the vessel, shewn to the insurers, parole testimony is admissible to explain it.

4. Durn. 208. When ambiguous words are used in a policy, they may be explained by the testimony of merchants. –

Policies of Insurance. –

Of Total & Partial Losses.

Where the loss is a partial one, the insurer pays a proportionable part of the sum he insured, or. But in many instances, altho' the loss is not total, the insured may abandon, as it is called, & recover of the insurer as for a total loss: And in these cases of an abandonment the insurers take all that is saved of the property. –

1. Ves. 98.

As to the cases in which the insured may abandon, it has been determined,

2. Stra. 1065. If the amount of the property saved is less than the freight, the insured may abandon; it being considered as between insurer & insured as a total loss. –

1. Burr. 187.

2 Bur. 883. 883. 1198. 1214. 3. Atk. 195. 1. Wils. 191. Doug. 219. Mills v. Fletcher. 2. Stra. 1250.

Generally, if the ship is taken, it is to be considered as a total loss that the insured may abandon: But, if she escapes immediately, or is retaken without much loss, or ransomed & proceeds on the voyage, the insured canna abandon. – Mansf. thinks, that where the voyage is not lost, they can never abandon. –

2 Bur. 904. If Pltff. fails in an action, for a total loss, he may still recover on the same declar.n for an average loss. –

2. Bur. 1167

Where the property is insured in the policy, at a certain value, & a partial loss happens, the rule for determining the sum to be paid by the insurer is the

Policies of Insurance.

What shall discharge the Insurer.

Doug. 247. McDowell v. Fraser. 2. Stra. 1183. 2. Wm. 170. Cowp. 785. 3. Bur. 1910. 9. 1919.

Any kind of fraud on the part of the insured, misrepresentation or even concealment of facts which are material will vitiate a policy & discharge the insurer. But a concealment of mere conjectures, or of calculations made from notorious facts, will not affect the validity of a policy.

3. Bur. 1307. Doug. 292. Barber v. Fletcher.

So, if the insured makes a private agreem^t with the first underwriter, in order to obtain his name first as a decoy to others, that he shall have a greater premium, or shall not be liable &c. it renders the policy void.

2. Stra. 1183.

And, as such a policy is void, if the loss happens in any way, whether by means of the fact concealed or not, the insurer is not liable.

When a policy is thus void, thro' fraud &c. if the insured has paid the premium, he may recover it back.

2. Stra. 1205.

If the ship is lost thro' the fault of the master or pilot, the insurer is discharged, unless such misconduct was insured ag^t.

E. 13. 7. Doug. 271. Lavabre v. Wilson. 2. Stra. 1264. 1. Burr. 292. 1. Show. 324. Cowp. 301. 1. Atk. 545.

A voluntary deviation from the course of the voyage, discharges the insurer. And this too, whether the loss happened during the time the ship was out of her course or not. But if a deviation is made in search of convoy, after detention, or occasioned by unfavorable weather &c. the insurer is not discharged by it.

2. Stra. 1240. Salk. 444. 2. Ray. 540.

Altho' there is a manifest intention to deviate, yet if there has not been an actual deviation, the insurer is liable. But if an insurance be made upon one voyage, & the ship actually sails on another, bound for a different port, the insurer is discharged, even if the loss happen before she arrives at the dividing point in the course, between the two voyages.

Doug. 10. Woolvage v. Boydell. 2. Burr. 32.

Policies of Insurance.

The insurer is not liable for losses by theft on board. (N.B. By the word theft in policies of insurance is meant piracy.)

3. Dump. 343. As a general rule, the insurer is not liable on the policy unless the insured strictly performs every stipulation or agreem.t on his part contained in the policy. As if the agreem.t be that the ship shall sail with convoy, this must be complied with, or the insurer is not liable; tho' if she is lost while sailing to the usual place of taking convoy, the insurer will be liable. —

4. Mod. 00.

2. Stra. 1205.

Salk. 443.

1. Show. 320. If the words are "to depart with convoy," this means not merely to set out with convoy, but to perform the whole voyage, unless prevented by accident, force, weather &c. —

When it becomes necessary for the vessel to repair or refit & for this purpose she is unrigged, & the tackle &c. put on shore, if a loss happens on shore, the insurer is liable.

1. Bur. 341.

2 Stra. 1263. If the vessel insured is constrained to perform quarantine, it is at the risk of the insurer, & he is liable for all losses that happen during that time. —

Stra. Opc. 1236. If the insurance be upon the cargo, "till landed &c. the insurer is liable for any loss that happens to them while on board a lighter for the purpose of being put on shore, unless the owner of the goods takes them into his own lighter, which is considered as a discharge of the insurer.

The perils usually insured ag.t in a policy, are

2 Rol. 248. 1. The perils of the sea. This comprehends all dangers from waves, tempests, rocks, &c. But if the loss happened thro' the negligence of the master, the insurer would not be liable; as, if the master in attempting to run into a harbour without a pilot, should run aground & founder, the insurer would be discharged.

2. Str. 1199. Four years unheard of, is a proof that the vessel has perished, by the perils of the sea.

2. Captures. This term does not comprehend hostical captures; neither does the term "enemies". It only includes captures claimed to be lawful, by the law of nations.

1. Durn. 259. 4. B.r 84. Cowp. 143. 1. Durn. 323. 2. Str. 1173. 2. Str. 1204. 3. Barratry of the master may be insured against. This is any wrong or fraudulent conduct of the master, without the knowledge or consent of the owners, by which loss ensues. The act must be a positive one, not merely negligence, & it must be voluntary on the part of the master; if he is forced into by the mariners &c. it is not barratry.

2. Vern. 170. 4. Restraint of princes, or any other governm.t; by which is meant a detention of the vessel, by an embargo &c. not a detention for unlawful conduct of the master &c. as an attempt to smuggle &c. Tho' it was once held that such an attempt might be insured ag.t by express words, but such an idea, is reprobated by L.d Mansfield.

Of Charter-parties.—

Beaves. 118. A Charter-party is a contract by which the owner of a Ship lets it to a merchant to perform a voyage, for a certain sum, which is call'd the freight.

If the vessel thus hired, or chartered, is lost, the hirer is not liable for the freight; tho' this rule is often superseded or varied by the terms of the contract.—

If a certain freight is to be payed on the outward bound voyage, & a distinct price on the homeward bound; & the vessel is lost in returning, the freighter is answerable for the freight on the former. tho' if the contract had been for the whole voyage entire, he would have been answerable for none.—

Id. 235. 245.

If the Ship returns without any lading on board, still the freighter is liable for the freight, if it was thro any fault or negligence of his, or of his factor, that she returned thus empty.—

2. Vern. 212.

If the cargo is ruined by the mismanagement of the master of the vessel, or if any loss is sustained by reason of the ill state of the vessel or tackle, the owner of the proceeds is not liable for the freight, but he may recover damages of the owner of the vessel.

+ vid. infra.

The owner of the cargo may in such case, abandon to the owner of the vessel, that he must abandon the whole cargo, or none of it.—

2. Bur. 882.

When the freighted vessel is captured & then recaptured the owners are entitled to a part of the freight proportioned to the part of the voyage performed & the property saved. But in such case the freighter, if he pleases may abandon.

2. Bur. 882. 888.

The rule that losses occasioned by the misconduct of the master are to be borne by the owners, has been adopted by our Supr. Ct. of Errors. By an Eng. Stat. the owners in this case are liable to no greater amount than the value of the vessel. No such Stat. in C.

+ vid. Supra.

Burrf. 18. 78.

Unless the terms of the contract are otherwise, the freight becomes due at the port of delivery, & the master has a lien on the cargo until it is paid; he is not therefore obliged to unlade it until the freight is paid. —

A parole charter is void unless earnest is paid. And if after payment of earnest the freighter retracts, he forfeits his earnest; & if the owner of the vessel retracts, he loses double the earnest. —

If the freighter sends the vessel on a voyage different from the one agreed upon in the charter-party, he is liable in an action at com. law. And if a
3. Atk. 555. penalty is agreed upon between the parties, to be forfeited in this event, as is sometimes the case, Ch.y will chancer it down to the real damage.

The owners of a vessel are liable for necessaries
1. Dunn. 73. furnished her, on the contract of the master; & this
2. Vern. 643. tho' the vessel is let out for any length of time. — The master is also personally liable in this case: And the vessel may itself be pledged for payment, & this is called an hypothecation. —

Eq. 13. The wages of mariners, are payable at every
2. Vern. 728. port of delivery; & an express agreement to the contrary
1. Stra. 405. will be relieved agt. in Ch.y. "Freight is said to be
1. Bro. 129. 179. the mother of wages" therefore if a ship is lost, or taken
3. Bur. 1844. the mariners lose their wages. So if they rebel or mu-
2. Lev. Ray. 1212. tiny agt. the master, unless they reasonably repent; or
1. Dunn. 74. if they wilfully absent themselves; or, leave the vessel before she is discharged of her lading, they lose their
2. Ray. 398. 576. wages. — The ship itself is pledged by law, for the pay. of their wages,
Stra. 707. 1. Vent. 140. & they recover them by a libel agt. it before the admiralty. Cts. —

Of the law of Partnership.—

As to what constitutes a partnership See 2 Ves. jr. 355. Doane v. Dawes' Ex. 115.— 1 Atk. 31. 37. 2 Bl. Rep. 968 &c.

The property of a deceased partner vests in his Ex.r but the surviving partner has the right of suing to collect debts due to the company.— He has this right, however, under a liability to account with the ex.r of the dec.d partner for his proportion of the monies thus collected.— The liability of being sued for debts of the co. also survives to the partner & does not extend to the Ex.r of the one who is dec.d unless the survivor is unable to pay such demands: And in this case, it has been customary to file a bill in Ch.y ag.t the ex.r; tho' Mr. Justice Story holds, that there is no necessity for resorting to that C.t.—

Salk. 444.

2 Ves. 459.

2 Ves. 148.

The true reason why the survivor is to bring forward all suits of the Company, & be sued for all claims upon them appears to be not because he has the absolute control of the joint property, but because of the inconvenience that would result from his being joined in an action with the ex.r; since in this case, one would sue in his own right, & the other in that of his testator, and the one would be liable to costs & personal arrest & the other not liable to either. For these reasons, the survivor is vested with the right of collecting so much of the joint property as is in action.—

Salk. 444.
Comb. 474.

Both the private property of partners in trade, & that which they hold jointly in partnership, is liable indiscriminately for every debt, whether joint or private.— But when the partnership property is taken for a private debt, it is to be sold by moieties, that is one half of it is sold to the buyer, & he becomes a tenant in common of the property with the other partner. The method formerly was to sell property enough to amount to double the sum due (where the partners owned equal shares) & then pay over one half to the other partner.— But the present mode, is the least expensive.—

Sa. R. 329.

Partnership. –

5. Durn. 601. When partners in trade become bankrupts, the mode of settling the estate is to apply the joint-property to the payment of the company debts, & the private estates of the partners (in the first instance) to the payment of their respective private debts. If, then there is a surplus of private property, belonging to any one of the partners, it is all liable for the debts of the company in case the company property is not sufficient to pay them. If there is a surplus of the joint-property, & a deficiency of private, some of the former as belongs to any one of the partners, may be applied to the paym.t of his private debts, but not to the paym.t of the private debts of any of the other partners. –

4. Bur. 2174. Coup. 448. An act of bankruptcy by one partner to which the other is not privy, is a dissolution of the partnership, to many purposes tho' not, perhaps to all.

4. Durn. 725-7-8. Id. 100.a. If one of several partners contracts, as for himself, i.e. without disclosing the partnership; still if the cont.t is, in fact, made for the partnership, proof of this fact (tho' it was unknown at the time of the cont.t to the person with whom the cont.t was made) will render all the partners liable. –

Semb. 3. Durn. 433-5. A surviving partner may join in one declar.n a demand accruing to him as survivor, & a demand accruing to him in his individual capacity. –

Of Factors.—

A Factor must pursue his commission strictly, or he will be liable for any losses that may ensue.

Ely. 108. If his commission is a general one, & the common usage warrant him, he may sell upon credit, but if he be restrained by his commission from selling upon trust, if he does it, it is at his own peril.—

1. Bur. 494. Cowp. 251. Amb. 254. A Factor has a lien upon the goods in his hands, not only for his factorage, but for any other demand he may have agt. the principal, & such goods cannot be taken from him by the creditors of the principal." vide inf.

Where the factor acts within the bounds of his commission, the principal is liable, & not the factor.— If the factor is in failing circumstances, the principal may order the debtors who have purchased goods of the factor to pay the debts not to the factor, but to him.

2. Str. 1182. Ely. 10. The case in Strange appears to be opposed to this idea but it has been since overruled.—

If the factor pledges goods of his principal for

2. Str. 1178. a private debt of his own, without authority so to do the pawnee obtains no lien upon them & the principal may take them without paying the sum for which they were pledged.—

If the factor imagines goods figure the duties, he may charge them over to his principal: but, if in attempting to do this the goods are seized & confiscated, the factor must bear the loss, even tho' he had the consent of the principal for doing.—

Ro. Ac. 104. The principal is liable for the frauds & the factor is like the latter acts within his commission. If he does this the principal is not liable.

Amb. 254. 3. Burr. 119. A This lien of the factor lasts no longer than a fact he has the goods of the principal in his actual possession, it is not transferable from the factor to any other person, therefore if he pawns goods of his principal the latter be owing to the factor all monies due to him may maintain trover agt. the pawnee.—

5. Burr. 604.

Where there are several owners of a ship, the majority are to govern as to the destination & voyage upon which she is to be out. They may in this case give a bond to the minority, to answer all losses & damages that may arise from such voyage, & if this is done the minority can never claim any of the profits of the voyage, tho' it seems they might, if this had not been done, even tho' they objected to the voyage & afforded no assistance in the freighting & fitting her out. —

Carth. 27. —

While the ship is in port, within the dominions of the Com. law, the master is considered as a common carrier, & like him, liable at all events, for losses that happen by theft, negligence &c. But when he is upon the high sea, he is governed by the law-merchant, which makes him liable only for actual negligence, or other culpable acts —

1. Vent. 190. 238.
2. Lord Ray. 918.

Below low-water-mark, & upon large arms of the sea, & perhaps upon large navigable rivers, the Com. law is not operative — Transactions without those limits are in the jurisdiction of the Admiralty-Courts, & the maritime law. —

2. Rol. 169. Molloy.

Of Real Property.

2. Bl. Com. 16. Real property is defined to be, that which is permanent, fixed, & immoveable, & which cannot be removed out of its place. — This definition, tho' good in the main, is not fully adequate; indeed, it is almost impossible to make a definition which will convey clear ideas of all kinds of real property. — As a general rule, when we have discovered what kind of property, upon the death of its owner, descends to his heir, & not to his ex^r. that is real property. —

Land together with the things adhering to it, & the profits arising from it, are almost exclusively the subjects of real property. — The term land, ex vi termini, includes not only the soil itself, but also every thing adhering to it, as houses, trees, fences &c. and not only whatever adheres to its surface, but every thing above it, usque ad coelum, & every thing below it, as mines, minerals &c. to the centre of the earth. — It also comprehends the water flowing or standing upon it, & the
2. Bl. Com. 18. only legal method of conveying water is by granting in the deed, so many acres of land covered with water. A mere grant of so many acres of water conveys only a right of fishery. —

But the term "land" does not include personal property lying or being upon it. & if a man should sell a field in which were cattle they would not pass with the land. So rails lying upon land if not made into fence do not pass with the land. —

So too certain things may be excepted & they will not pass, tho' without such exception they would pass, as trees, houses &c. When a house is thus excepted or when a house standing on the land of the grantor is conveyed away without the land, it is questionable what kind of property it is. One thing is certain, the owner of the land on which the house stands in such case, can never disturb the owner of the house in

the enjoyment of the house so long as it stands; but whether upon the death of the owner of the house it descends to his heir or ex.r is doubtful. The practice I imagine, is, that the heir should take it.—

If A. builds a house on the land of B. without licence, it immediately becomes B's house; tho' he has A. might be entitled to some part or all of its value. If A. had licence, the house would still be B's (unless it was so constructed as to be moveable), but B. would be compellable to suffer A. to enjoy it peaceably.—

Tenements & hereditaments are words of nearly the same import as "real property", the one meaning any thing that may be holden or possessed; the other any thing that may be inherited, & is said to be of the most extensive signification of any words applicable to real property.—

They are divided into corporeal & incorporeal. A corporeal tenem.t or hereditam.t is land in its above signification.— An incorporeal hereditam.t is an estate not visible or tangible, a right to the enjoyment of certain privileges or profits arising from a corporeal tenem.t — as a right of way, of common &c.— —

The estates which may be had in land are fee simple, fee-tail, estates for life, for years, & at will.— The three former only are real property, or freehold es-

Of Fee-Simple.

An estate in fee-simple is the highest kind of estate that can be had; the tenant in fee being possessed of the full, entire & absolute dispose of property thus holden. And tho' in its original signification it implied an estate holden under a superior; yet it is considered in C. as resembling the feudal allodium which was where the land was possessed by the tenant in his own right, not holding it from any superior. In conformity to this latter idea, an estate upon a total failure of heirs in its owner does not escheat to any superior; tho' provision is made by Stat. in C. that it shall in such case belong to the State.

The words necessary in a conveyance to constitute a fee simple estate are "to one & his heirs forever." And it seems that in a deed, all other words in the Eng. language would not answer the purpose; words of inheritance & perpetuity being considered as indispensibly necessary.

This, tho' a general rule is not an universal one. The exceptions to it are the following.

1. Where in the deed of conveyance there is a reference to some former convey.ce in which the necessary terms were used. ex. gr. A. conveys to B. "his heirs forever;" B reconveys to A. giving him a title "as full as he, A. had before granted to B.;" here, as A. had before granted a fee simple to B. B is considered as granting back a fee simple to him.

So, where Coparceners or joint tenants are seized of land in fee, one coparcener or joint ten.t may release to his fellow, his share of the estate without the words "heirs forever," there being in this case reference to the estate they both had, which was a fee simple.

Fee-Simple.

2. In deeds to corporations the word "successor" is used instead of "heirs," as a corporation cannot be said strictly speaking, ever to have heirs. If it is a corpor.ⁿ aggregate, a deed without either of those words (heirs or successors) will convey a fee simple, or at least the corpor.ⁿ will enjoy the estate as long as it exists, tho' perhaps it may be said to be only an est. for life. — Upon the dissolution of a corpor.ⁿ or the death of all its members, the estate reverts back to the original donor.

Co. Lit. 9.
1. Rol. Ab. 833.
2. Bl. Com. 109.
2. Sw. 244.
Co. Lit. 9. &c.

3. In case of devises the strictness of the rule is by no means enforced. Because, in testamentary conveyances, it is an established rule that the intention of the testator, if consistent with the rules of law, supersedes technical nicety of expression. The proviso "if consistent with the rules of law" relates not to the words or form of expression used by the testator, but to his intention, as to the nature and species of estate devised. — If, therefore his intention is legal, if the estate he means to devise away, be one which by law, is capable of being devised away & he has power to make such devise; his intention shall be obeyed tho' expressed in an informal manner, & even tho' "the rules of law" affix to his language a meaning different from that which he intended. — If testator having an estate tail devise it in fee simple the devise is not good because the testator's intention is not consistent with the rules of law. —

Doug. 327. (341.)
Hodgson v. Ambrose.

A devise "to A & his heirs" without any limitation, conveys to him only an est. for life, which from the whole will, the testr.ⁿ intent.ⁿ that he should take a fee, is clearly apparent. Cowp. 235.

So, a devise of a house "to A & the heirs of his body" is not good because the testators intention is, to create an estate, not permitted "by the rules of law" to be created, viz. an est. tail in personal property. In C. perhaps this devise might be good, since the words when applied to real property in C. vest an absolute property in the issue of the donee

in tail. — Sed. qu. for the intention of the testator would be frustrated by our rule, as much as by the Eng. —

In the following cases, the words made use of by the testator, have been holden to convey a fee simple estate. — "To J. S. in fee simple" — "To J. S. forever, or to be his forever" — "To J. S. to pay the Testator's debts or upon his paying a certain sum specified" — "of all my effects both real & personal to J. S." — "all I am worth, where the testator possessed fee simple estates, it was held to pass them." — In the word "estate", "I give all my estate to J. S." has been held to refer not only to the subject devised, but also to the interest the testator had in it, & if he had a fee simple, it would pass. — According to some authorities, if words of locality are affixed to the term, as "all my estate, lying at S. &c." it is meant only as a description of the subject, & not of the interest & therefore it carries only a life estate; but the current of authorities is the other way, & two late decisions establish it that the word "estate" ex vi termini carries a fee. —

Vid. 330. — Cowp. 300. — 2. Ves. 674. — 2. Verg. 68. — Cro. Jac. 327. 599. — 2. Lev. 91. — Cowp. 299. — 1. Br. Ch. 437. — 2. Atk. 38. — 2. P. Wms. 324. — 2. Ves. 674. — Cowp. 300. — Doug. 730 (759) — Right d. Sidebotham — 3. Wils. 414-418. — 1. Durns. 412. — 2. Id. 657.

But a devise of "all my farms, or all my lands," has been construed to carry only an estate for life; tho' perhaps the intention of the testator is as clear in this case, to give a fee, as when he uses the word "estate" — There has been one case of the kind, decided in Sup. Ct. to be a fee, & this judgt. was affirmed by the Ct. of Errors —

3. Wils. 418.

Fee Simple –

The term "heirs" when made use of in a deed of conveyance, is not considered as ever coming out any particular persons, who under that name are to take the estate, but it is made use of as a term expressive of the quantity of estate conveyed. thus, when an estate is given to A & his heirs forever, it is not the meaning of the grant that the heirs of A. are to take any thing by the instrument. Altho' it is expressed to be "to A. & his heirs" A may immediately after, convey it away & thus deprive his heirs of it entirely. – So that the heirs of A. by such a conveyance acquire no beneficial interest in the estate, except the chance they have of enjoying it, after A's death. –

Plowd. 343.

In case of devises however, where it clearly appears to be the testator's intention, to point out, some particular persons by the word "heirs" they have been admitted to take. So too, in indulgence to the testator's intention Cts. have sometimes dispensed with the maxim "nemo hæres est viventis", but this must be where the intent is clear & apparent to give it to some particular person under the description of "heir, & not to any person who might happen to be heir, therefore, a devise to the heirs of B. who is now living, or "to B. & his heirs" conveys nothing to the heirs of B. – But if the testator by way of recital should mention that B. had an only son & heir, & give his property to him, or in any way shew his design to give the estate to some particular person it would be good. –

Vid. 337 a.
Cowp. 309.

4. Burr. 503.

5. Ray. 330.
2. Vent. 311.
1. P. Wms. 229.
1. Fonbl. 441.

It is a rule established in Shelley's case*, & which has been since adhered to, that if an estate be given, in an instrument, to one for life, & afterwards, in any part of the instrument to the heirs of such person, the heirs as such, take nothing by the conveyance, but the first taker (to whom it was expressly given for life) shall take a fee simple, or if it be given to the heirs of his body, a fee-tail, — & this rule applies equally to deeds & wills. —

* 1. Co. Rep. 93
2. Bur. 1103-8

So far is settled law, but it is a question which is still unsettled, whether, if from other words in the instrument, the testator's intention can be clearly ascertained that the first taker shall have only a life estate, it shall not be complied with? Some contend that this ought to be the case, while others maintain that a strict adherence must be paid to the rule, that "the heirs" are never to take when the term is made use of to denote any person who may become heir. Mr. R. thinks that as the authorities & opinions of eminent lawyers in Eng. are divided & contradictory ~~on the subject~~, we ought in C. to take the reasonable side of the subject for our law, which he holds to be clearly, that the intention of the testator should prevail. —

4. Bur. 2579.
8. C. Doug. 320. (343.) in note —
Quid. collect. 1. vol. 281. — 1. Co. 86. —
Pro. Eliz. 313.
1. Vent. 231. 225.
1. Ves. 142. 2. Ib.
Ad. 2. Atk. 247.
1. Atk. 412.
1. P. Wms. 123. 142.
Ad. 2. Ib. 349.
535.

Or a cov.t upon a marriage ~~settlement~~, "to convey to A. for life, & remainder to his heirs forever" in the very words, which according to the above rule would make a fee simple in A. if A. does thus make a settlem.t to himself for life &c. it is a fulfillm.t of the cov.t in Ch.y tho' directly opposite to the technical import of the words. —

vid. cases cited above from P. Wms.
1. Fonbl. 399.

Fee-Simple. —

When a fee-simple estate is granted "to a man & his heirs forever" any limitations imposed by the grantor, incompatible with the qualities of a fee-simple are void; the estate passes to the grantee unincumbered with such limitations: Ex. gr. A fee-simple is alienable, devisable, descendible to the heirs general, liable to dower, & liable in the hands of the owner to be extended for his debts, tho' not liable to be sold for that purpose. And none of these qualities can be taken away by any modification in the grant or devise of a fee. As, if the estate should be given "to one & his heirs male forever", the attempt to render it descendible only to male heirs would be void, & the grantee would take it descendible to his heirs general —

+Ved. 333.

Co. Lit. 18.

Vaugh. 269.

Co. Lit. 27. 130.

Tho' no legal quality of a fee-simple can be excepted in a conveyance, yet some part or adjunct of such an estate may be excepted; as, ex. gr. the timber trees growing on the farm; these may also be conveyed without the land on which they grow. —

8. Rep. 137.

At Com. law no remainder can be limited after a fee-simple, for when that is once given away, there remains nothing more to be disposed of. But now, by way of executory devise, such a remainder may be created. —

Co. Lit. 18.

Cro. Jac. 591.

Of Estates - Tail.

Co. Lit. 21. a. An estate given "to one & the heirs of his body" is an estate-tail; & these words in a deed
2. Bl. Com. 114. are essentially necessary, to the constitution of an estate tail. - As an estate tail is a less estate than a fee simple, the donor being tenant in fee simple, has a reversion left in him; so that if at any time the heirs of the body of the tenant in tail fail, the estate reverts to the original donor. -

2. Bl. Com. 115. In a devise other words than "to one & the heirs of his body" are construed to carry an estate-tail; a greater liberality of construction being adopted in this case, as in that of fee-simple estates. As the words to a man & his seed, or his issue &c. -
Co. Lit. 27 a. & devise to a man & his heirs male creates an estate
5. Durnf. 338. tail - a grant by deed in the same terms constitutes a fee simple. -

An estate tail general, is where the estate
2. Bl. Com. 113. is to descend to any heirs of the body of the donee it being created by the above general words "to one & the heirs of his body" - An est. tail special is where it is limited "to the heirs of the body of A. by such a wife, or husband," as "to J. S. & the heirs of his body by Mary his now wife"; and in this case none can take but those who are the children of both J. S. & Mary; for if she should have other children by another husb. or he, others by another wife, they could not take. -

1. Fonbl. 422. It may also be farther limited to the heirs
Fearne. 319. male or female of the donee; and in this case
Co. Lit. 124. it has been contended, that the person to take, must
Hob. 31.
Pre. Ch. 442. 461. be not only of the sex described, but must also
589. 5. Bur. 2015. be heir to the donee; ex. gr. an estate is given "to
Co. Lit. b. 1. Sec. 31. note a. A. & the heirs female of his body" - A. dies leaving a son & daughter; now as the son is the heir, & not the daughter, it is said, she cannot take, ~~but the~~

for altho' she is female, she is not heir female, & the current of authorities comport with this idea; but there are contradictory ones. — If from other words in the instrument, it can be inferred that the females were intended to take, it will go to them —

2 Bl. Com. 114. A person claiming an estate tail male or female must derive his or her title entirely thro the sex described; as, if an est. be given to A. & the heirs male of his body; & he has a daughter, who at the time of his death, is dead leaving a son, the son cannot take the estate. —

Fearne 8-9. 300. 9. Co. 127 b. 1 P. Wms. 605. 3. Atk. 308. Carth. 343. Co. Ent. 525. 2. Atk. 308. 3. Burr. 83. Cro. Jac. 415. Cas. t. 234. 2. Bl. Com. 298. 381. Estates tail may be created by implication. As, if an estate be given "to J. S. & if he die without issue, then to J. D." This is an estate tail to J. S. & the heirs are the issue in tail. — So, an estate given "to J. S. & his heirs forever, & if he die without heirs of his body, then to J. N." is an estate tail. But this must be made by way of devise; if made by deed it would not create an estate tail. — (Qu. Is not this limit.ⁿ in C. an executory devise, as it would be in Eng. if the words were "without heirs of his body, heirs J. N." &c. —

Fearne 301-2.

11. Co. 50. Popk. 194. Tenant in tail is not liable for waste. But if he has sold timber trees, & the purchaser has not taken them off from the land, during the life of the tent. he cannot do it afterwards, as the estate descends to the heir with every thing affixed to it, & the heir takes it free from any incumbrances laid upon it by the ancestor. It is not liable in his hands for the debts of the ancestor.

2. Bl. Com. 115.116. 1. Fonb. 288.290. The wife of tenant in tail is entitled to dower, & the husb. of a female tenant in tail to his curtesy in the estate tail.

It is another privilege of estates tail, that if the tenant attempts to convey away a greater estate than he has (viz. a fee simple) it does not occasion a forfeiture of his estate; but such conveyance operates only as a lease to the grantee, for the life of the tenant in tail; that being the greatest estate he can convey away; and it not being possible for him, as long as it continues an estate tail, to do any act prejudicial to the interests of the heir. —

2. Bl. Com. 116. But he may, by a certain act deprive the heir entirely of any interest in the estate & render it a fee simple in himself. This is effected by suffering a common recovery, & is called docking the entailment. And it is now held to be an inseparable incident to an estate-tail, that it is liable to be docked in this way. So that it now answers the purpose for which it was intended by the Stat. de donis (viz. that of locking up estates in certain families) but very little, if any better than the old fees simple conditional at com. law. — An estate of that kind was created by the same words as an est. tail at present, "to one & the heirs of his body"; but as it was holden that this was an estate upon condition of the tenant's having heirs, & that the condition was fulfilled as soon as he had heirs, it from that moment became a fee simple in his hands. — 2 Bl. Com. 115.

Estates-Tail. –

In C. an estate tail cannot be made to last
St. of C. 24. longer than one generation, for by Stat. a fee simple is vested in the immediate issue of the first donee in tail; and this donee cannot dock the entail for the Stat. itself has prevented perpetuities, & thus effects the object of a common recovery. – In other respects an est. tail in C. resembles the same estate in Eng. The wife, it has been decided,* is dowable of it, which could not be the case, if the first taker took only an est. for life, as has been contended. –

*by Ct. of Errors, but the Ct. was divided.

It has also been doubted by some, if it were a special entailmt. whether, on the death of the first donee, all his issue would not be entitled to take it in fee: but Talk. supposes that the Stat. vests a fee simple in the same persons, who in Eng. would take a fee tail; & that therefore, those only, who come within the limitations of the deed, could take. –

Fearne 304-5. 342. 3. P. Wms. 259. Pow. on Dev. 232 237. –

Personal property cannot be entailed: & if express words of entailmt. are used, the whole property vests in the first donee. – But express words of entailmt. may by other words be restricted, so that a subsequent limitation will be good. –

1. P. Wms. 663 Talk. 225. 2. Burns. 720 *Id. 280. –

If words are used which create an estate tail in real property by implication, they will if used in a conveyance of personal property, vest a life estate in the first taker, remainder over, provided the words of implication are sufficiently restricted in point of time: as, "if he die without issue living at the time of his death" &c. – (What becomes of the property, if the remainder never takes effect by the contingency's failing?).

1. P. Wms. 254. 2. Ves. 640. 2. Atk. 308. 3. 78. ***Id. 312. Fearne. 303. 378

Of Estates for Life.

An estate for life, like est. in fee simple and fee-tail, is a freehold estate; but it is not, like them, an estate of inheritance.

2. Bl. Com. 121. Any estate (except an est. of inheritance or, at will) which having no determinate durn. may, by possibility last during life, is a life estate, tho' upon the happening of certain events it may be determined before the life is, upon which it is given; as, if an est. be given to a woman during her widowhood, it is a life estate.

Estates for life are sometimes created by operation of law, & sometimes by the act of the parties. & they may be holden either for the life of the tent. himself, or for that of some other person; in which last case it is called an estate pur auter vie.

The estates for life created by oper. of law, are the following.

2. Bl. Com. 124. Co. Lit. 27. 28. 4. Co. 53. 1. That holden by a tenant in tail after possibility of issue extinct. This is where there is a special entailmt. as "to A. & the heirs of his body by his wife B." & the person from whom the heirs of tail are to spring, is dead without heirs; & that it is impossible for the est. ever to descend; the possession of it is called tent. in tail after &c. The estate of this tenant is an estate for life in all respects, except that he is not liable for waste.

2. Bl. Com 120. Ved. N. 2. Estate by the curtesy. This is the estate which the law gives the husbd. in the lands of his wife, after her death; & by the Eng. law, is to last during his life. In C. it has been questioned whether it should last longer than till the children of the marriage arrive at full age, & there has been one determin. that it should not. Four things are necess. to entitle the husbd. to this estate; viz. 1. marriage 2. actual seisin of the wife (in C. a right to the possession is equivalent to an actual seisin) 3. Birth of issue capable of inheriting the estate. 4. Death of the wife.

3. P. Wms. 229. The husbd. is entitled to his curtesy in a trust-es-

Estates for Life.

1. Atk. 603. tate belonging to the wife. So too, he is entitled to it in an equity of redemption, where the wife is a mortgagor. Where the lands are given to the separate use of the wife, he is not entitled to curtesy. It may be a quest.n in C. whether the tenancy by the curtesy ought not to be governed by the law of gavelkind, by which the husb.d has but one half of the wife's lands, & that whether she had issue or not, our ~~Charter~~ tenure in this State, being according to the custom by the charter. But Atk. thinks the practice has so long been contrary to it, that it has become the com. law of this country, & incapable of change, unless by Stat.

3 Atk. 605
1 Ves. 298.

2. Bl. Com. 129.
Co. Lit. 30.
+ Ib. 14.

3. Dower. This is the estate given by law to the wife, in the real property of the husb.d after his death. It is to consist in Eng. of one third of all the ~~real property~~ estates of inheritance of which the husb.d was seized during the coverture, & a seisin in law, or a right to seisin in him is suff.t to entitle her to it. But she must be capable of bearing issue who could inherit the estate, i.e. if she had had issue, that issue must have been capable of inheriting the estate.

2 Bl. Com. 131.

+ Ib. 14.

By Stat. in C. she is to have only a third of what the husb.d died seised. To this estate the wife has an indefeasible right. The husb.d cannot devest it from her, neither can she be prejudiced in the enjoym.t of it by the husb.d's creditors. And in this State, voluntary conveyances by deed made by the husb.d in contemplation of death, to his children, as a provision for them, have not been considered as depriving the wife of her dower, altho', in strictness, he cannot be said to die seised of lands thus conveyed away.

+ the Cor. consid. such conveyances, as in fact testamentary dispositions.

Co. Lit. 32.
1. Br. Ch. 320.

Wife cannot be endowed of an estate held by the husb.d in joint tenancy. Nor of an equity of redemp.t

Co. Lit. 32. 2 Bl. Com. 130. *Ibid. 32a.

The wife loses her dower, if she elopes from the husb.d with an adulterer — 2d, she loses it if the husb.d is attainted of treason or felony — A divorce a vinculo matrimonii also deprives her of it in Eng. but not in C. unless she is the guilty party. But the most usual way in which she is barred of Dower is by jointure. —

2 Bl. Com. 138. Pow. on Cont. 54. 3. Atk. 607. Co. Lit. 36.b. note 7. St. of C. 147.

A jointure in order to be a complete bar to dower, must be made of real property, for a term at least as long as the life of the wife, & not pur auter vie &c. It must be to take effect immediately on the husb.ds death — It must be competent — and it must be expressed in the deed to be in bar of dower — So low it must be made before marriage; for if it is made afterwards, she may if she chooses abandon it & take her dower. — When made before marriage she is bound by it, altho' she was, at the time of making it, an infant. Under the Stat. of C. a jointure may be made of personal pro. & for a term of years, tho' Mr. doubts whether the legislature meant to alter the com. law. —

4. Co. 1 — 3 — 4 — 5. Co. Lit. 36. Pow. on Dev. 480. 3. Co. Rep. 27. *Ibid. 330. 332.b.

Dower may also be barred by the husband's giving in his will real or personal property in lieu of dower, but in this case the wife has it at her option to take dower or relinquish the sum thus given her, or not. — In C. it is a prevailing opinion with the common people that a wife is not entitled to dower unless it is given her in the will; they, therefore, frequently give their wives "one third of their real prop.y" without expressing it to be in bar of dower; & it may become an interesting question whether the wife shall have this together with the dower, or only one third part of the whole*. — The practice of the Cts. of Probate, generally is to give only one third part. —

As to the method of the wife's obtaining her dower see Stat. of C. 148 — 9.

* If the husb.d in such case, has bequeathed all the rest of his prop.y away, will it not afford evid.ce of his intention that the wife should take only one third for life? —

Estates for Life —

No particular words are necessary in a deed to convey an estate for life — Any words which do not convey an estate of inheritance, & which do not affix a determinate period to the estate, make an est. for life. —

2. Bl. Com. 122. The general qualities of an estate for life, (whether created by oper.n of law, or by the act of the parties) are. 1. The tent. is of course entitled to reasonable estovers. 2. Forfeits his estate for waste; or if he alienes it for a greater term than he has, as in fee, tail, or for another's life. & in this case the grantee takes nothing. 3. The tenant for life shall never be prejudiced by the sudden determination of his estate; for as it is determined by his death which is an act of God, the maxim applies that "actus Dei nemini facit injuriam." — Therefore the Ex.r of a tent. for life is entitled to the emblements, crops &c. growing on the land at the time of his death. If, however, the estate be determined by the act of the tenant himself, as if a tenant during widowhood shou. marry, or if the estate is forfeited for waste &c. the above rule does not apply, & the emblements &c. go to the reversioner. — And yet, in this last case, if the tenant for life, has leased out the estate to an under tenant, the latter shall not receive any prejudice from such determin.n of the estate by the tenant for life. —

Co. Lit. 42. 183. 1. Rol. Ab. 845. An estate which is granted by one to another for life, without expressing for whose life, is generally understood to be for the life of the grantee, but, in such case if the grantor has only an estate for his own life, or an estate tail (which gives him power over the estate only during his own life), it shall be construed to be an estate for the life of the grantor. —

An estate for life, therefore, may be holden by the tenant for his own life, or for the life of another person, & in the last case is called an estate pur auter vie. —

Estates for Life. –

If the tenant dies before the cestui que vie (or person during whose life he holds the estate), no provision was made by the Com. Law, for the disposal of this estate. It could neither go to his heir or executor, nor could it revert to the first donor, or escheat to the Lord of the fee: it was, therefore, open to the first occupant. – The Stat. 29. Carl. 2. has provided that it shall descend to the Ex.r or Adm.r like any other personal property. – Stat. 11. Geo. 2 has made it distributable, after paym.t of debts, like personal prop.y. – Altho there is no Stat. concerning it in P. Mr R. thinks the provisions of the Stat. Carl. would be adopted by the Courts.

The maxim of the Eng. law "that a freehold estate cannot commence in future" is virtually abrogated in P. by a Stat. & the decisions of the Cts. have deprived it of all operation. –

Of Estates for Years. –

2. Bl. Com. 143 Any estate which has a known, fixed, & determinate period, is an estate for years. – As an estate
3. Durnf. 482 "for 20 years, if J. S. so long live;" here altho J. S. may not live 20 years, & therefore the estate may be determined before the expiration of the 20 years, yet as it is certain that it cannot last longer than that time, it is an estate for years. –

This estate must also have a certain beginning, & if no time is mentioned in the deed, when it is to commence, it commences from the date of the deed. –

2 Bl. Com. 143

Estates for Years.—

So, if the time of its duration does not appear certain from the deed, yet, if by reference to any other instrument &c. it can be made certain, the estate is good.—

The words generally made use of to constitute a lease for years are "lease, demise, & to farm let," but these words are not necessary.—

3. Bl. Com. 144. The word "term" made use of in a lease, denotes not merely the time for which the lessee holds the estate, but also, the interest he has in it; and if by any means he forfeits his interest in the leased premises (as by committing waste, alienation &c.) his term is also forfeited.—

Tenant for years is of course entitled to estovers.

An Estate for years (which is generally denominated a chattel real) is personal property, & upon the death of the possessor goes to his Ex.r or Adm.r.—

3. Leonf. 15. 4. 4. 580. It cannot be created by parole (except for three years by the Eng. Stat.) either in Eng. or C. but it may be created by other writing than a deed, i.e. by writing without a seal.*

2. Geo. 3. c. 25. 4. cont.

*v. 279.a

If the time of the expiration of an estate for years is known to the lessee at the time of sowing his crops, those crops if standing on the ground when the lease does expire, go to the remainderman & not to the lessee; but if the estate determined upon the happening of an event, which was not occasioned by the lessee himself, & of which he could not have known when he sowed his crops, he shall be entitled to them & not the remainderman

*Vid. 278.b.

*Parole leases are frequently made in Ch. & if lessee enter under such lease, he is no trespasser, for the Stat. is construed not to render his entry illegal, but merely to prevent him from gaining any interest by the lease. — If in this case, the lessee, after having entered, continues in possession, & enjoys, he is not bound by the cont. to pay rent, but on the ground of enjoyment he is liable to the lessor, as on a quant. valebat. and the parole agreem.t as to the quantum of rent is admitted as presumptive evid.ce of the value of the profits.

If an owner of land makes a parole agreem.t with another to give a written lease at a future time, & in consequence of this agreem.t the later enters with the leave of the former, in this case if the person entering has done any thing to benefit the land, Ch.y will decree a specific performance of the parole agreem.t vs. the other. — And the lessor cannot eject the person to whom he has thus agreed to lease his land; for, when one is compellable in Ch.y to do any act, (as the owner here is to make a written lease,) he, shall not, at law, avail himself of having omitted to do it. —

#Vid.

Of Estates at Will. —

This is merely a licence from the owner of land to another to enter & enjoy it, & can hardly be called an estate. — It is determinable both at the will of lessor & lessee, & this too even if it is expressed to be "at the will of lessor." —

Co. Lit. 55.

Any act of ownership exercised by the lessor, over the land, incompatible with the lessee's tenancy is a determin.n of the estate; as, if he enters & cuts trees &c. to a sale by him determines the Estate. —

Co. Lit. 55.

1. Rol. Ab. 800.
1. Ven. 247.

On the part of the lessee any act inconsistent with the duties of a good tenant is a determin.n of his estate: as if he commit any act which in other tenants would be waste, it is a determin.n of the est. & he is liable in an act.n of trespass — he is never liable in waste. — So, an assignment by the tenant at will determines the est.; as does also the death of either of the parties, as it is not a descendible est.t —

Co. Lit. 55. Co. Eliz. 84.
Carth. 202. Doug. 550. (552) cont.

After the est. is determined, the lessee if he remains in possess.n is a trespasser; tho' if the determination is by the lessor he must have notice of it. — But he is always entitled to free ingress, egress, & regress, to carry off his emblements tools, cattle &c. & if he is obstructed in the lessor in this, he may maintain trespass against him.

1. Ven. 248.
5. Bac. Ab. 157.

Salk. 413. Co. Lit. 55.

2. Bl. Com. 150. An estate at sufferance differs from an est. at will only in the manner of its commencing. — It is where a person who has been in possession of land by a legal title, as by a lease for years, remains in possession after his title is gone, after the lease is expired. Its incidents are the same as those of an est. at will. —

1. Sw. 253. 2. Hl. 88. 77. In C. as every person who has a right to possn. is considered as being in possn.; it may be questionable whether this est. can ever exist. — If however it can exist some notice must be necessary to the tenant before he would become a Ten. Sufferance. —

Emblements. —

2. Bl. Com. 122. 145. 464. Emblements are those crops which are annually raised by the labour of the occupier of land, as corn, &c. but not such crops as are permanent & not produced by annual labor, as most kinds of grapes, the fruit of trees &c. —

They are sometimes considered as real, & sometimes as personal prop.; thus they lapse in a devise of land without being named, & it is not theft to steal them; here they are considered as real prop. but they always descend to the ex. & not to the heir, like personal prop.

C. Lit. 55.

Upon the determin. of any estate whatever, if that determin. was effected by the act of the ten. himself or, if when he sowed his crops he knew the est. must be determ. before he could reap them, the emblements go to the reversioner or remainderman; but, if it is determinable upon an uncertain contingency not depending upon the tenant himself, he is entitled to the emblements upon its determin. —

Emblements. Timber-trees.

So if a tent. for years whose estate is to end on the 1st day of May, lows crops which are standing at that time, district can not be rear'd till July, he cannot then rear them, they will go to the reversioner. – So, if an est. is given to a woman "during her widowhood" if she marries when there are emblements growing she is not entitled to them, for it is her own act, but if she had leased the est. thus holden to an under tenant, he would not be ousted of the emblements by her marriage, for he is guilty of no fault or wrong act. –

1 Rol. 728. Cro. Eliz. 51. 400. 463. Cro. Car. 515.

On the death of one joint-tenant the emblements go not to his exr. but to the survivor. –

5. Co. Rep. 115.

When land is recovered from a disseisor by the disseisee, the former is not entitled to the emblements. –

Moor. 24.

Timber-trees when sold, become personal pro tt. at the last landing. – If they are excepted in a deed they also become personal pro tt. – If excepted in a lease for life, they still remain real pro tt. as they belong to the freehold, notwithstanding the exception. – If in this case the lessee, or, after a sale in fee the grantee, purchases the trees they become real pro tt. again. – If they are sold to a lessee for years, they become pers. pro tt. –

4. Co. Rep. 63. 11. Ib. 48.

Where a disseisor has leased the land, this lessee is liable to the disseisee for all trees that he takes, but he can not be considered as a wrongdoer & sued in trespass for them he must be sued in trover. –

11. Co. 51.

The words "without impeachment of waste" in a lease operate as a sale of the trees to the lessee if he chooses to take them. –

Co. Lit. 220. Moor. 327. 1 Rol. 152. Cro. Car. 274.

Of Incorporeal Hereditaments.—

1. A right of way, is the right which one may enjoy of passing over the grounds of another,— & it may be possessed by any one in fee, for life, or for years.— This may be created by implic.ⁿ of law, as if one sells a lot of land wholly inclosed by his own land, the law allows the grantee a right of way to this lot, over the lands of the grantor; & in such a case as this, the right of way is a tacket to the land to which the way leads, & descends with that, to the heir, & not by itself alone.— It cannot even be assigned by itself.—

Co. Lit. 56. Doug. 715. 745. 1 Su. 442.

2. Offices of a ministerial kind, tho' they are considered as incorp.ᵗ hereditᵗ & may be granted in remainder, or assigned, in Eng. are not regarded as prob.ᵗ in C.— If an officer dies before the expiration of his office, it neither descends to the heir, nor goes to the ex.ᵗ.—

11. Co. 4.

3. An annuity is a charge on the person of the grantor, & payable annually.— But, tho' it is a charge merely personal, yet it may be as to the grantee an est. of inheritance, & descend as such to his heir. Its descendibility is the only thing that distinguishes it from pers.ᵗ prob.ᵗ. it is not subject to curtesy or dower. Annuities cannot be entailed, & an annuity "to one & the heirs of his body, is a fee-limb. conditional, at com. law.—

Co. Lit. 20. 1 Bua. 315. Pow. on Dev. 231-2.

4. Rent is an annual sum reserved by the lessor of land, to be paid by the lessee; & is real prob.ᵗ descendible to the heir. Where the rent is all paid, in gross, at the time of making the lease, this is not real prob.ᵗ. If obligations given at the time of making the lease, & payable at stated times, as a sale fact.ᵗ for the rent, are not regarded as rent.— It is only growing rent, that is real prob.ᵗ; that which has become due & is paid, is pers.ᵗ prob.ᵗ.— Accruing rent is not discharged by a release of "all demands."—

4ᵗ. 144. Popl. 8ᵗ. Cro. Eliz. 217. 832. Cro. Car. 289. 5 Co. 111.

Ftzd. 73. Cro. Eliz. 575. Salk. 578.

Of Estates upon Condition:—

Conditions annexed to a grant, are precedent or subsequent.— A precedent condit.n is one which is to take place before the estate is to vest; a subsequent condn is one upon which the estate after vesting, is to be divested.

Co. Lit. 201. 205. 217. — Pow. on C. 251—7. If a precedent condit.n be impossible to be performed at the time of making it, or if it become so afterwards either by the act of God, of the law, or of the party himself who makes it; or if it be unlawful, or repugnant to the nature of the estate, the grantee can take nothing: the estate never vests in him.— If a subsequent condit.n be impossible, unlawful, or repugnant to the nature of the estate, the condit.n itself is void, & the grantee takes an indefeasible estate.—

2. T. Rep. 133. A proviso or condition in a lease, "that if lessee becomes a bankrupt lessor may enter" is good.—

2. T. Rep. 138. A condit.n that lessee of a term shall not assign, is good. 2n. If a lease is made to one "his ex.rs" &c. is a condit.n that ex.rs &c. shall not assign, good? since ex.rs must take it as are for the purpose of paying charges on the estate.

2. T. Rep. 140. 425. If one holding an est. for life &c. on condition that he do not alienc, assign, or encumber &c. attempts to alienate &c. by a deed, which proves to be absolutely void for want of legal requisites, his est. is not forfeited.—

A difference exists in the Eng. law between a condition & a limitation. If an est. is granted away, & a condition annexed that it shall become the grantor's upon a certain event taking place, the grantee may still remain in possn. after the condition is performed until the grantor reenters. But if the est. is created with words of limitation, the est. vests immediately & of course upon the happening of the contingency without any entry.

1. Ves. 422. 223.

2. Bl. Com. 155. 3. Burnf. 41. "So long as" — "while" — "until" are words of limit.n i.e. a condition in law. — "Upon condition" — "so that" — "provided" are words of condition in deed.

Autho's for this title. Hardr. 4 Dy. Co. Lit. 205. 2 Lev. 125. 150. 601. 653. 513. 1 Br. Ch. 63. Doug. 282. 740. 1 Ld. Ray. 383. 2 Vent. 305. 33 Ar. Ch. 99. 1 Ves. 361. 9 Mod. 190.

Of Mortgages.

A mortgage is a pledge of land as a security for the paym.t of a debt; and tho' in form it is a conveyance of the land to the mortgagee, & he has a legal title to it, yet Cts. of Ch.y lett in the mortgager to redeem his land, even after the time he has himself fixed for that purpose has elapsed.

Mortgages are now managed almost entirely in the Cts. of Ch.y. The law as established in Cts. of Law is now simple; it is like that relating to any other estate upon condition. Before the day fixed for paym.t of the debt which is the condit.n upon which the est. is to revest in the mgor, the mgee has a defeasible est.; but as soon that time is elapsed without paym.t he has an absolute est. — In Ch.y however as the intention of the parties in the first conveyance is regarded, it is still considered only as a pledge for the paym.t of the debt, & the mgor after the law-day is permitted, when a pl.ff to Ch.y to redeem, upon paym.t of principal, interest & costs. —

Pr. Ch.y 99. 1 Ves. 361.

And, indeed, to every essential purpose, the interest of the mgee tho' he has at law, an absolute fee simple est. is, in Ch.y regarded only as personal prop.y. If he devises "all his lands, tenem.ts & hereditam.ts" the mortgaged lands do not pass, unless from other parts of the will, or from extrinsic facts it is discovered to have been his intention to pass them. But by a will of all his personal prop.y his lands will pass, nor need the will be authenticated by three witnesses as a devise of real prop.y must be: —

Barnard. 457. 2 Vern. 621. 2 Ves. 455. 5 Durn. 652.

2 Bur. 978.

So after the death of mgee & the or heir of the term hence for paym.t, the est. nominally belongs at law to his heir: but if the mgor redeems, the Ex.r of the mgee has the money & his heir is compellable in Ch.y to reconvey to mgor. If mgor never redeems, the mgee's ex.r may compel the heir, as his trustee, to convey to him, the ex.r.

2 Rep. Ch.y 155. 88. 1 Vern. 170. 1 Ch. Ca. 283. 2 Ch. 220. 187. 51. 2 Vent. 348.

Pow. on M. 298. 303. 479.

2 Bur. 827. In case of intestacy on the death of the mgor descends to his heir or it may be devised the mgor in fee in tail &c. like other real Ests.

A mortgagor in possn is in law considered as a tenant at will to the mgee, but he is not liable to pay rent, because, instead of rent, he pays interest on the debt due to the mgee. Yet if turned out by the mgee (as he may be at any time) he is not entitled like other tens to the emblements; the mgee takes them, but he must account for them to the mgor. And if the profits while the mgee is in possn amount to more than the interest of the debt they go to buy the princ.

2 Ath. 244. 10 Mo.

11 Co. 51.

1 Ath. 506. Doug. 21.

Pow. on M. 68.

If mgor while in possn leases the land, the mgee may either lie the lessee as a trespasser & turn him off; or he may take rent of him as a tenant. If he takes rent of the Ten he must acct for it when the est is redeemed. If the lessee is turned off by him, he (the lessee) is not entitled to the emblements, but mgee takes them & accounts.

Pow. on M. 37.

In these respects the mgor while in possn differs from a tent at will; for a tent at will can never make a lease of the least validity; but the lessee of mgor is well in possn till turned out by the mgee & may maintain trespass agt a stranger who disturbs him. — Ath. quere whether the mgee when he ejects the lessee of mgor can recover of him for the mesne profits while in possn.

Doug. 21.

Co. Lit. 15. Co. Car. 303.

Pow. on M. 72.

A disseisee cannot recover them of the lessee of disseisor tho' he may have disseisor himself. From analogy it would seem mgee ought not to recover them of lessee of mgor. — It is settled that he cannot recover rent

Doug. 21.

of the lessee which he has actually paid to the mgee tho' rent arrear he may recover. – Against the mgor himself, the mgee cannot be by bill recover any mesne profits, because the former is not liable for rent the considered as a tenant.

2. Atk. 10. 3. Ve. 254

Co. car. 304.

A lease by the mgor also operates so far as to give the lessee such an interest in the land that he may redeem. In this case however, his lease is not merged, but he still holds as lessee. –

If mgor can prove an express agreemt. that he should continue in poss.n for a fixed time pas. till the day of paym.t he is tent. for years, otherwise he is merely such a tent. as is described above. –

Pro. Jac. 559.

It has been holden by the Circuit Ct in Ireland, that if after the mortgage made, the mgor is permitted to remain in poss.n this furnishes presumptive evidence of an implied agreemt. that he shall continue in poss.n till the day of paym.t –

Chy will issue an injunction to stay waste act. mgor in poss.n, tho' a tent. at will such injunct. will never be awarded

3. Atk. 223.
Pow. on M. 75.

Tho' redeemable poss.n of a mortgage is so far considered inherent by a Ct. of Chy. that the parties themselves cannot by any agreem.t they may make, at the time of making the mortgage, render it irredemable at any future period; & Chy has so carefully watched over the interests of the mgor that they have held him not bound by an agreem.t to sell the equity of redemn. entered into at the time of making the mortge. – But he may make an agreem.t to give the mgee the right of pre-emption if he will give as much as any other person. –

Pow. on M. 27.

1. Vern. 483. 84.
1. Ch. Ca. 214. 292.
2. Vern. 520.

Pow. on M. 119. 27.
Harder. 155.

Talb. Ca. Pr. 1. Vern. 255. 15. Vin. Ab. 458. 1. Br. Parl. Ca. 419. 309. Pow. on M. 28. 119. 157.

When the mgor has bn a agreem.t relating to the making of the mortge bd the equity of redem.n to the mgee & this agreem.t contains a condition that the mgor may redeem the whole by paym.t of a certain sum by a certain time; if this last agreem.t is not strictly complied with Ch.r will not relieve.

2. Atk. 464-5. 1. Vern. 192.

So it has come to be title in Ch.r as a maxim, that "once a mortgage, always a mortgage": by which is meant that when a mortgage is once made, it must continue until redeemed. To this maxim, however there are some exceptions. as,

Pow. on. M. 31. 2. Vent. 364. 1. Vern. 232. 193. 7. 214. Hard. 511.

1. In cases of family-settlements: where a near relation or person of the same family, for the purpose of making a settlement on another, gives him a mortge, there is an agreem.t that if he does not redeem it during his life &c. it shall not be redeemed & yet this agreem.t is binding & must be strictly fulfilled.

2. Where the mortge is made by means of a defeasance, or condition, separate from the deed of conveyc.e if the mgee sells to a bona fide purchaser an absolute est. he acquires by the purchase an est. not subject to the mgors equity of redem.n. Yet, even in this case, the mgee is on paym.t or tender, compellable in Ch.r to reconvey, or pay a penalty, but this penalty will not be double the value of the land as is usual but only a little more than its value, because in most cases it will be impossible for the mgee to reconvey to mgor. If the defeasance is connected with the deed, the mgee's assignee takes the est. by gift to the family & mgor must redeem it at all, if the assignee.

2. Atk. 495. 2. Vern. 84.

3. The d.r's full length of possession by mgor itself will not ~~[illegible]~~ bar the mgor's right of redem.n Ch.r because, not being adverse to the mgor's claim it is not within the stat. limit.n yet if mgee has, or 20 years in Eng. or 15 in Ire. treated the est. as if he were the absolute owner & not mgee the est. will be considered as absolute. In this case mgee's possession is considered as adverse.

Pow. on M. 149. 2. V. 35. Eq. Ca. 53.

But it will not in this case be a bar, if any fraud has been practised on the part of the mgee.

Pre. in Ch. 131. 3. Atk. 313. 2. Ver. 340. 3. P. Wms. 288. 1. Eq. 323. 1. Br. Pa. Ca. 309. 2. Atk. 194.

If the mortgor can prove that he has paid interest to the mgee within the 20 or 15 years or that the mgee retains the oblign for the debt, the mgees holding is no bar to redemptn. — Disabilities in the mgor as infancy &c. will prevent the stat. from attaching so as to bar redemptn. — If the stat. of limitas has begun to run on the mortgn an intervening disability does not save the bar arising from the mgees holdn. — When mgor remains in poss. even after forfeiture, the stat. does not attach. —

2. Vern. 415. 3. Ver. 4. Burr. 300. 7. Atk. 333.

Pow. on M. 150.

In case of a Welch mortge i.e. one payable on a certain day in such a year or on the same day in any subsequent year the holding of mgee for any length of time the unaccountabl'd by any such circumstances as receiving of interest by mgee &c. is no bar to redemption. — In these cases the mgee generally takes the rents & profits in lieu of interest. —

Pow. on M. 135. Pr. Ch. 223. 2. Vern. 701. 1. P. Wms. 291. Br. Pa. Ca. 309.

1. Vern. 405.

It has become a question in this country whether sales of land redeemable within a certain time for taxes are mortgages after that time or not. Such sales in the State of Vermont have been very common. Mr. C. supposes that they are strictly mortges. If this opinion is just the former owners from whom the taxes were due are entitled to their equity of redemn. The words of the stat. enacting that unless they are redeemed in a certain time the lands shall be absolutely vested in the purchasers are the same as those used in the defeasance of a mortge. —

Mortgor in fee or fee tail may gain a settlement by notice of his interest in the mortgaged lands; a mgee in fee gains no settlem.t — But a Stat. Ulm. 2.o the former acquires in the same way a right to vote at elections; the latter does not.

Lang. 510.

Of the effect of Tender in Mortgages.

Pow. on M. 454. 4.a

Payment or tender of paym.t to mgee in fee or fee tail before the day entitles the mgor to an action of ejectment against the former: Or, if mortgee brings ejectm.t against mgor in fee or fee tail, the plea of paym.t or tender is a good bar. Tender after the day fixed for paym.t at Com. Law has no effect but in Eq.y if the sum to be tendered is certain or can easily be ascertained, & the mgor will give 6 calendar months notice to the mgee a tender will bar the interest from the time it is made. — But if the sum to be tendered is uncertain, or if the mgor does not strictly comply with the terms of the notification it will not have that effect. The mgor must also in case of such a tender swear that he has been ready always since the tender to pay the money & that he has not used it for his own benefit.

2 P. Wms. 376.

3 Atk. 90. 1 Eq. ca. abr. 318. 4. Pow. (411-12)

2 Ves. 3.a 2.

2 P. Wms. 376.

If in the notific.n the mgor appoints a place for paym.t & no object.n is made by the mgee at the time, tender at the place appointed is good. In other cases than this tender must be made to the person of the creditor unless he is out of the realm or unless a place of paym.t is fixed in the co.t — Lord P. thinks the case in 3 Atk. stands on its own footing & does not establish the law that the mgor may fix a place of paym.t in mgee's

2 P. Wms. 3.a 8.

x. a Lit. 216

If mgor in possession has paid or tendered, & mgee tho' he does not sue, refuses to reconvey, Ch. will compel him under a penalty to make a reconveyance: And if he is a bankrupt so that a penalty can have no effect upon him Ch. will quiet mgor in his possession so that he can never afterwards be disturbed by mgee.

Fri. id. 103.b. In ordinary cases, tender & refusal takes away the mgee's claim to the land only; & he still has a remedy upon his cont. for his money. But in cases of a voluntary mortge tender & refusal not only destroys the mgee's lien on the land, but also discharges the mgor's debt: For, as the effect of the tender is a destruction of the lien, & leaves the mgee no other remedy than that arising from a former debt or duty; & as, in this case, there was no precedent debt or duty whatever, the mgee has no remedy left.

Pow. on. M. & Po. Lit. 2 Cr. & J. 9. Reps. 77.

Barnard Ch. Reps. 90. If after the day of paym. the mgor pays the mgee his demand it is dubious whether a Ct. of law may not give redress to the former in an action of ejectm. on the latter's refusal to reconvey. In Pitton & a. Ct. of law has afforded redress to a mgor in such a case; and it is said that there have been similar decisions in Eng. contained in M.S. reports. There is no doubt that Eq. will relieve mgor in this case.

Parole proof of the paym. of the debt for which a mortge has been given, is good, unless the debt be barred by Specialty. Is it not good even in this case, in Eq.?

— Mortgages. —

Mgee in possn is liable to an injunction agt waste; And tho' the mtor does not ask for such injunction yet on redemption mgee must account for waste committed. If the estate pledged is an insufft security Ch. will not grant such an injunction. Mgee in possn is never liable to an action of waste. —

Pow. on M. 94.

If mgee in possn refuses to make necessary repairs the mgor may in Ch. compel him to make them but at the expence of mgor —

Pow. on M. 98. 442. 3 Atk. 518.

If mgor has a defective title, or none at all, at the time of making the mortge & afterwards procure a good one, the mgee may avail himself of this subsequent title agt the mgor himself the agt the mgees he cannot. —

Pow. on M. 9. 2 Ves. 11. 2 Vern. 11.

Of proof of a Mortgage by parole evidence —

A deed has portions to be an absolute one cannot directly not by parole testimony be proved to be a mortgage, or in other words, direct parole testimony is not admitted to prove a condition or defeasance agreed upon between the parties. But if there is an agreement to make a mortge & in fraud accident or mistake an absolute deed is executed Ch. & Eqk. enforces Ch. of law will on proof of the agreem. consider the conveyance as a mortge. For this is not a par

Talb. Ca. 30. 2 Atk. 380. Pow. on M. 94-5. Re. Atk. 523. 2 Vern. 288.

Pre. Ch.ry 525.
3 Woodes. Lect. 430.
Pow. on M. 110. 65.
Talb. 60

defeasance, but a parole agreem.t to make a written defeasance. – So parole proof of a train of circumst.l facts the existence of which is inconsistent with the estate being absolute in the grantee, but which are all reconcileable upon the idea of its being a mortge is admissible & will induce a Ct. of Ch.ry to consider the conveyance as a mortge tho' it burnt to be an absolute deed. – and this they do upon the ground of its being a trust between the parties.

Of the Equity of Redemption & who may claim it.

3 P. Wms. 341. Pow. on M. 124. 2 Vern. 67. 2. Atk. 294. Ibid. n. 5.

An equity of redemption on a mortgage in fee is a debt in Equity tho' not at law. & Ch.ry will decree a sale of it for paym.t of debts.

Ibid. n. 5. 1 Vern. 410. 1 Salk. 354. 3 P. Wms. 341.

The reversion if any remaining on a mortge for years is legal assets, & ex.or may go aq.t them to be levied mando accederint. But if the term mortged is all the interest the mgor has in the lands the equity of redem.n is once equitable assets.

1 Vern. 101. 63. 99. 2 P. Wms. 412. 2. Atk. 50. 1 Mod. 117.

An equity of redemption as well as the land itself may be devised to trustees for the paym.t of debts. In such case it is considered as assets. Lands devised to an ex.or for this purpose were formerly holden to be legal assets but it is now settled otherwise.

Mortgages.

The mortgor is the person first entitled to the eq. of redem.^n. After him, the heir, the wife, or any person having a legal title may redeem. Without a legal title none can redeem.

Pow. on M. 151-2. 321. 334.

On the death of the mortgor the eq. of redem. or right of redeeming descends to his heir (not to the ex.^r). And for the heir's sake of redeeming, the heir is to have aid of the personal est. of the mortgor in some cases tho' not always. To determine this, enquiry must be made whether it was the real or personal estate of the mortgor that was benefited or increased by the mortge.; if it was the latter (as is almost always the case) the heir shall have aid of it, on the ground that that estate which in the life of the mortgor received an increase in the mortge. shall after his death remain as it has thus received, & in this way restore both funds to their original situation. — But the heir is not entitled to the pers.^l prop.^y to the detriment of creditors or legatees except residuary legatees.

Pow. on M. 308. 377. 2 Salk. 449. Talb. Ca. 53-4. 1 Br. Pa. Ca. 14. 210. 252. 401. Pre. Ch.^y 477. 91.

Talb. 53.

A devisee of an equity of redem. is also to have aid of the mortgor's pers.^l prop. to assist him to redeem, not however to the injury of creditors, unless it is evident the testator's intention, that he should take it cum onere. And this intention is presumed where the test.^r has bequeathed away all his pers.^l prop. in specific legacies but where the legacies are pecuniary or general, it may be taken by the devisee to exonerate the mortge. lands.

Pre. Ch.^y 477. 1 Atk. 45. Talb. 53. 2 Vern. 477. 1 Br. Pa. Ca. 210. 2 P. Wms. 380. 3 Ch. 358. 1 Br. Ch.^y 252. 401. 1 P. Wms. 593. 2 Vern. 477. Salk. 449. cont.

If the test.^r's intent.^n is clearly expressed, that the devisee shall have it free from all incumbrances, & there is not a sufficiency of pers.^l prop. to redeem it, he shall be assisted with the real prop.^y from the heir.

2 Atk. 422.

The heir of an assignee of an equity of redem. has no claims on the pers.^l fund of the assignee to enable himself to redeem: for the pers.^l est. of the assignee is not increased but diminished by the purchase of the equity.

1 Br. Pa. Ca. 181. 1 P. Wms. 347. Pow. on M. 410.

As to the wifes right to redeem see bag. —

As the same land may be mortgaged several times to different mgees, a subsequent mgee may always redeem from a prior one, & by such redemptn he holds the land as a security both for his own mortge & also for what which he has paid. — He also by his redemn obtains a priority over any intermediate mgees not only for the sum he has paid to the first mgee but also for his own mortge.

Pow. on M. 228. 2 Vern. 150. 1 Eq. 49.

Assignees of a bankrupt mgor may redeem.

Vide infra

So too creditors of mgor in certain cases may redeem. —

Where one made a voluntary conveyance of land to another which he afterwards mortgaged & the mortgee being ignorant of the conveyance having been decided to be superior to that of the voluntary grantee, yet the latter had acquired such an interest in the land that it did not lett him in to redeem. —

1 Vern. 193.

Prior creditors have a right to redeem before subseq. ones. If one makes a mortge in which he stipulates to pay mgee all his present & future demands & declares the mgee est. liable for both, still a creditor without notice may redeem without paying those debts which are subsequent to his own quere, tho' he must pay those which are older than his. — The rule, as to those, would be the same, if there was no such clause. If he had notice of the clause at the time his debt was contracted he must pay subsequent ones, as before. —

Ibid.

2 Vent 353. 1 Vern. 49. Pow. on M. 121.

If heir of mgor redeems at a small price, less than the amt of the debt, a subseq. mgee may redeem of him at the same price; but if first mgee lets his int for less than the sum due no person wishing to redeem must pay the whole debt, & not barely what the assignee paid. —

1 Vern. 336.

Of appropriation of debts to the purposes of tacking subsequent to prior mortgages.

*Ow. Ver. 2 Atk. 54. 202. 552. Ab. 110. Pr. Ch. 40. 131. 1 Ven. 24. 1 P. Wms. 8. Pow. on M. 139. 500. 1 Ven. 24. 2 W. 207. 2 Ch. Pow. on M. 468.

It is a general rule that if the mor* is entitled to the mgee or any other acc.t than that for which the mortge was given, a Ct of Eq. will not suffer him to redeem either in equity, without paying not only the mortge money but also those other debts, on the ground that he ought to would have equity must do equity. It being considered as ~~only~~ reasonable & right that he pay those for which no security has been taken. — This rule is adopted in Ch.

If however the other debts due to mgee are also secured by mortge this rule does not hold, unless the taking mortge for such other debts is a decline course. — But if mgor has mortge two pieces of land for two several debts one of which is not of as much value as the debt it is intended to secure & the other is of much greater value than the debt for which it is secured, the mgor will never be permitted to redeem the latter without at the same time redeeming the former.

The above rule that mgor must pay other debts when he redeems applies in its full extent only to the mgor himself. If other persons interested redeem, the rule obtains under certain modifications; which respect the nature of those demands of the mgee that are not secured by mortge & their priority to the demands or other creditors in point of time, ex. gr. If in the above case, the heir or devisee of mgor would redeem, he is obliged to pay only such of those other debts as are specialties for the heir or devisee is liable only for the ancestor's debts. — The ex. mgee has a term for years. The ex.r on redemption, must pay all the other demands of mgee whether due by specialty or simple contract. If in the two last cases, the heir or ex.r has sold the equity of redemption the assignee is bound to

1 P. Wms. 1 Vern. 8.

Pr. Ch. 512. 40. Pow. on M. 148.

discharge on redemption, or in the immediate lien created by the mortge; yet the heir or ex.r is personally liable for the other debts due to mgee.

1 Ves. Sr. 3. Atk. 550. Pow. on M. 145. 8. 2. Atk. 53. 353. 3. Ves. 530. Pre. Ch. 225. Pow. on M. 214. 229.

A subsequt mgee may redeem without paying even a specialty-debt due from mgor to mgee. Otherwise as to a judgment in the hands of the first mgee. This is considered as being a lien on the land of mgor. A mgee must pay it provided the first mgee to whom it belongs but no notice of the subsequent mortge.

Pow. on M. 130. 31. 317.

If mgee retaines for foreclosure the above rules do not obtain; the mgor is then not obliged to pay any other debts than that for which the land was actually mged unless the mortge contained a provision that it should be a security for future debts &c. — Mgor is obliged to pay other debts only when he retaines to redeem.

1 Fonbl. 310. Pow. on M. 135. 149. 228. 231. 244. 2. Atk. 53. 253. Ch. Ca. 35. 201. 1 Vern. 187. 2 Ves. 573. Atr. 240. 2 Vent. 337. 3. Atk. 238. 2. P. Wms. 402. 2 Ves. 552. Atr. 2. 225.

Where there are several mgees of the same land the last or a subsequt one may in many instances by redeeming of the first or by purchasing in his title, yet himself in the place of the first, & will then, by tacking his own mortge to the one he has thus purchased in, hold the land agt the intermediate mgees as a security not only for the first mge that he has thus purchased in, but also for his own debt. He cannot redeem out of his hands, without paying both. But in order to entitle himself to this advantage it is essential, that he should have had no notice of the intermediate mortge at the time he lent his money & took his mortge, for, if he had he cannot tack it in this way.

The above rule is founded on the principle that

1 Vern. 187. 2 Ves. 5 & 3 A. where there is equal equity, he who has the legal title shall be preferred. As the subsequent mortgagee is considered as having equal equity with the intermediate ones, having knowing of their incumbrances, he is preferred to them when he has thus acquired the legal title.

Pow. on M. 214 (187). 1 Vern. 187. Gordon. 318. 2 Vern. 30. 2 Eq. Abr. 172 cont. This idea of the preference of the legal title, ~~has given~~ a preference, has been carried so far, that where the first incumbrance thus purchased in is a satisfied one, that is one which has been paid up, still it has been held to protect the purchaser, give him a preference over an intermediate incumbran

2 Vern. 159. 1 Ch. 52. 3. And it has even been held that where the first incumbrance was procured to ~~have~~ that the subsequent mortgagee might avail himself of it & tack his mortgage to it to the prejudice of intermediate incumbrancers. Quere? Verum.

2 Vern. 234. 1 P. Wms. 340. 7 Ven. Ab. 54. Pow. on M. (188-9). But if a prior incumbrance thus purchased in, is deficient in any legal requisite, it will be of no avail to the subsequent mortgagee.

Cowp. 712. 1 Ves. 64. In Eng. as a judgment is a lien upon the land, the same law is applicable with regard to that as to a mortgage.

1 Ev. 310. It has not been settled in C. whether a subsequent mortgagee may tack to the prejudice of intermediate incumbrancers. In Ireland he ought not to be allowed to tack because by means of the public records, he may in all cases obtain notice of the intermediate ones. Why not the records be considered as constructive notice in all cases? In the registering counties in Eng. this doctrine has not to be; but this may be on the ground that practice & records are not there universal —

2 Atk 295. 295. a.

Cowp. 712.

Ante 204. b. Of the effect of Notice in Mortgages.

A clause in a mortge "that the premises shall be holden for any future disbursements" will affect such only as they & mgees as have notice at the time of lending & such only. —

Ante 85 If mgor commits an act of bankruptcy, & mgee not having notice of it purchases the equity of redemption, the purchase is valid. —

Pow. on M. 1838. 1 Ton. 152-5. Barnard. 101. 2 Vern. 55. 1 Ch. 3 C. 2 Atk. 29. 1 Ch. Ca. 393. 2 Vern. 135. 3 Atk. 280. 1 Ves. 350-1. Ante 205. b.

Where a first mgee has notice that a second mge is about to be made & money advanced on the security of the same land mortged to him, it is his duty to give this 2d mgee notice of his prior incumbrance if he has a convenient opportunity; and if he does not & the second mortge is made without notice of the first the second mgee will be preferred to the first. Thus it was holden that if first mgee is a witness to a subsequent mortge & does not give notice of his own lien, the subsequent mgee shall in all cases be preferred unless it be proved that the witness was ignorant of the contents of the deed he witnessed. Because the witness is presumed to know the contents of an instrument which he attests. But this position is contradicted by Berwick & Trueman.

1 Ves. 5. 1 B. Ch. 435.

So too in another case a subsequent mgee is preferred to a prior one, not having notice of the prior one). This is where the prior mgee has contributed to his detention by suffering the title-deeds to remain in the hands of the mgor. —

3 Atkins. 280. 3 Ves. 350. 1 T. Rep. 672.

Mortgages.

Pow. on M. 225. Co. House

Vid. Sub. 295 a.

Pow. on M. 229. 2 Ch. Ca. 245.

2 Vs. 485.

Notice may be either express or presumptive. The a man is presumed to have notice of the contents of a deed to which he is a witness but this may be rebutted. So one is always presumed to have notice of the contents of a deed under which he claims title, & of all deeds thro' which his title is derived. So if he can or never entain. the necessary notice is found in the possession of the person entitled to notice, he is considered as having notice.

1 Ves. 51. 55. 59. 2 Ab. 477. 2 Vern. 574. 509. 1 Br. Par. Ca. 244.

Notice to a mans agent, attorney or counsel is just such notice to the party himself. but it must be an actual agent &c. not one who has formerly been agent &c. & is not but at the time the notice is given.

2 Vent. 348 351. 4 Ward. 457. 2 Vern. 357. 2 Ch. Ca. 50. Pow. on M. (2 Ed. 1).

After the death of the mgee; the mgee's assets descend not to his heir, but to his Ex.r, & on redem.n the money must be paid to the latter. But if no nomina descends to the heir; the if no redem.n is made, he may be compelled in Eq.y to convey to the Ex.r being considered merely as a trustee for him.

1 Vern. 2 Ch. 103. 307. Pow. on M. 294. Barnard. 50.

Tho it be expressly provided in the mortge that the mgor may pay either the heir or ex.r of mortgee, yet if paym.t be made to the heir he as trustee to the Ex.r is compellable in Eq.y to pay the money to the latter.

1 Vern. 271. Pow. on M. 305. But if mgee sells the heir & not the Ex^r of the assignee is entitled to the assignee's right. For the assignee is considered as having made an absolute purchase to encrease his property; & not like the mgee as having taken by the conveyance of the mortge a mere security for money lent.

Pow. on M. 305. 2 Vern. 581. Pr. Ch. 265. 2 Bur. 969. So if mgee devises the heir & not the ex^r of the devisee will take, on the death of the latter, if it appear to have been his intention that the est. should pass as real. So if money secured by mortge is ordered to be laid out in land it will go to the heir.

3 Ptwms. 217.

Pow. on M. 307 (275). Ff. 16. Among joint mgees there is no jus accrescendi, except in the case of hus & wife.

It has been decided in C. that if mgor petitions to redeem after assignment by mgee, the mgee must be made a party to the bill (as well as assignee) whether he has been in possession or not, & if it be necessary may be included in the decree. In Eng. he is not made a party unless he has been in possession.

2 Ch. Ca. Abr. 594. Pow. on M. (428.)

X

If, in Eng. a subseq^t mgee sues mgor in poss^n in an action of ejectment, mgor cannot deny the Ex^r title, on the ground of a prior mortge. But if the first mgee will lend the deft his title-deeds the latter may defeat the pltfs action. In this case, however, the first mgee, as he is instrumental in keeping the subseq^t incumbrancer out of possn, must account with the latter, when he redeems, for the whole profits even tho' he has rec^d none. In C. the mgor is not allowed in this case, to bring into ct the first mgee's title-deeds, but the latter may by a cross in Ct & countenancing mgor's defence, bar subseq^t mgee's action. — If mgor has a defective title, or none at all, at the time of making the mortge, & afterwards procures a good one, the mgee may avail himself of this subseq^t title ag^t mgor himself, because mgor will not be suffered to impeach his own deed which he gave to mgee. But ag^t strangers this subseq^t title will not avail the mgee.

Pow. on M. Ch. 2 Ves. 11. 2 Vern. 11.

Of Accounts between Mortgor & Mortgee.

2 Atk. 534. The mgee when he enters into possession which he may do at any time after forfeiture must account with the mgor for the rents & profits. And the general rule is that he answer for what he has & not for what he might have received. This rule however does not obtain where he has conducted negligently or fraudulently as to the profits: for in that case he must account for the real annual value.—

Pow on M. 490. 492. 1 Vern. 45. 475. 3 Bac. Ab. 552. S.

Unavoidable losses fall upon the mgor — A mgee in possn must make necessary repairs or lose the value of the profits which a prudent & honest man would have made from the land. And for such a loss distinct from meliorations, losses by wte. which in Cancellor Hardwicke's time the mgee is to be allowed in settling the account.—

1 Vern. 45. 475.

If mgee lease out the land he is answerable for the rent. If he lease it unreasonably low he is answerable for the real value.—

If mgee in poss. is obliged by his situation and circumstances to employ a bailiff or steward to take care of the land he shall have a reasonable allowance from mgor for the sym. of the bailiff. But if there be an agreem. between mgor & mgee that the former shall be at the expence of paying a bailiff to be employed by the latter yet if he does no employ one there is nothing to be allowed him. And if the agreem. be that mgor shall pay mgee for his own trouble in receiving the profits the agreem. will not be allowed.—

1 Vern. 313. 3. Atk. 518.

2 Atk. 120.

If mgee gives his interest in the estate without a sufficient mgor he is liable for the rents & profits after the assignm. if a vendee is insolvent or unable to pay.

Pow on M. 472. 473. 3 Bac. Ab. 558.

1 Vern. 2 Ch. 258. Pre. Ch. 3. Pow. on M. (425) — Subsequent mgees cannot compel first mgee to enter & take the benefit of the est. & allow his own debt: but unless he enters himself & takes leases he cannot prevent them from entering & taking the rents. Or if he lets the mgor remain in ten.s he will be answerable to the subsequ.t mgees for the rents & profits when they come to redeem. This is where he has notice of the subsequent incumbrances; if he has no notice he will not be liable for the rents & profits. —

3 Bac. Ab. 359. Pow. on M. (428). — Then a subsequent mgee redeems of the first mgee if the latter can produce a settlement between himself & mgor the redeeming mgee must allow the balance struck & pay it to the first mgee, such settlem.t being binding upon all subsequent mgees unless it can be impeached of fraud. — And if mgor afterwards redeems he must allow the same acc.t to the mgee who redeemed.

Pow. on M. (429). — But an acc.t between mgee & his assignee, is no binding upon the mgor or any subseq.t incumbrances.

Pow. on M. (429). — An assignee is not obliged to account for the profits that accrued before he received the est. by assignm.t.

2 Vern. 535. — Where mgor had but the mgee to great expence by pretending not to have a title by reason of an entailment &c. but was finally defeated. Mgee was allowed all the extra costs he had been put to being considerably more than his legal costs were taxed at & mgor com.d relief to pay them before he could redeem. —

The rents & profits received by the mgee after the settlement of the account are always set off against the interest accruing on the debt and from mgors if they amount to any thing more, they go to link the principal. Annual rests are made & the surplus of the profits over the int. deducted from the principal each year, if they amt. to any thing considerable: This mode of settling the acc.t the mgor is entitled to, if he claims it & it is much the most advantageous to him as it operates

2 Atk. 353. & 354.

constantly as a sinking fund upon the principal. The other mode of accounting, which is the most advantageous to mgee. which is adopted when the excess of ~~interest~~ profits over the interest is trifling is effected by bringing the whole amt. of the profits into one aggregate sum, & deducting it from the principal & interest. interest being computed for the whole time on the whole original principal. —

Of Foreclosure.

The object of a foreclosure is to fix a time within which the mgor must redeem or forever lose his equity of redemtn.; this is done by a Ct. of Ch. upon application by mgee & if mgor does not redeem within the time prescribed the est. becomes absolute in the mgee —

2 Vent. 335. 1 Vern. 232. — A foreclosure will in no case be confirmed until ~~the~~ after the time fixed by the parties for payment is elapsed without payment by mgor.

1 Br. Ch. R. 308. 2 Ves. 255. — When there are joint mgees they must all join in a petition for foreclosure. —

Pow. on M. (433). — In a bill for foreclosure the title of the mgee cannot be impeached by ~~mgor~~ nor is it to be inquired into for if he has no title, the foreclosure will give him none that operating only to bar the mgor's right of redemption. —

2. Atk. 344. 3. Keb. 357. 79. 54, 712. Pow. on M. 490. (434)

Doug. 401.

Pow. on M. (453). 1. Eq. Ca. Ab. 316. 3.

A mgee may pursue all his remedies agt the mgor at the same time; he may therefore bring forward a bill for foreclosure & an action of ejectment & an action on his bond or note all at once. But if he obtains his foreclosure first & goes into Ch. pst. it is a discharge of his other actions; but he may refuse to go into Ch. pst. after having obtained a foreclosure, if the land mged is insufft to answer the debt, or for other reasons. Then the foreclosure is no bar to his actn on the bond. — So, if he has actually recovered his money on the bond he can not have a foreclosure, for his debt is bar'd. But if he has only recovered judgmt & not obtained his money, he may still go on & foreclose. Ch. however will never suffer him both to foreclose & obtain his money on the bond, because it would be getting his debt twice over. —

Yet, if he recovers in ejectmt he may still sue on the bond or petition for foreclosure; for after a recovery in ejectmt he still holds as mgee & mgor may still redeem. —

After obtaining judgmt on the bond the mgee may take the land mortged in exn as well as any other property if he chooses. —

If any part of the debt however small remains unpaid, the mgee may foreclose or eject; nor can the mgor in case of ejectmt recover back what he had before paid — he must either redeem or lose what has been paid. If, however, after part-paym. a foreclosure is obtained, Mr K. supposes that on principle the mgor is entitled to recover back what he has paid: once in this case he is considered as precluded from a redemption & in most cases, actually is so, since if this is the case as the foreclosure is considered as a paym. of the debt the mgor has paid all that he paid towards a redemption, without any consideration. —

— Mortgages. Foreclosure. —

Pow. on M. 479. 435. 1. P. Ca. 51. 2. V. 24.

On the death of the mortgr a bill for foreclosure must be brot by his Exr not by his heir. If it is brot w. the heir it is a good cause of demurr to the bill. But the Exr may join the heir with him in the bill if he chooses & it will be good.

3. P. Wms. 333 in note

If the mgor is dead the bill for foreclosure must be brought agt his heir.

2. Vern. 66.

But if a foreclosure is obtained w. the heir of mgee no objection being made by mgor on account of his bringing the bill, it is good; but the heir obtain the land only as trustee to the Exr & may be compelled to convey it over to him tho' if the heir chooses he may bid to the Exr the mortgd money & he will then be entitled to retain the land as his own. —

If after the death of mgee a fresh bar is committed on the mortgd lands the heir is the proper person to sue not the Exr. If the heir will not sue there appears to be no remedy for the Exr unless he pays old would compel the heir, on a bond of indemnity given him, to lend his name to the Exr. — W. P. supposes that in C. the Exr would indeed be allowed to bring an action himself. Qu. —

Pow. on M. 481. (43.) 2. Eq. ca. Ab. 303. pl. 38.

The time fixed, in a decree of foreclosure, for redemp. is to be computed by calendar & not lunar months. —

Pow. on M. 483. 4. 492. 449. 2. Vern. 515. 553. 185.

In a bill for foreclosure those persons only are foreclosed who are parties to the bill: If therefore there are subsequ. incumbrancers who are not made parties it does not operate as a foreclosure to them, they may still redeem. This seems to be the rule whether the mgee had notice of the subsequ. incumbrances or not.

2. Vern. 461. 2. Ch. Ca. 170. cont.

2. Ves. 23. 2. Vern. 351. 2. Vern. 342. 392. 3. Pre. Ch. 155. 224.

When an eq. of redemn descends to an infant, he may be foreclosed but he has 3 months allowed him after he comes of full age to impeach the decree w. him, if he can shew any fraud error, &c. it will be set aside; otherwise, not. —

3. P. Wms. 352.

Pow. 485. (444.) 2 Vern. 418. 3 P. Wms. 352. 2 Atk. 333.

If feme-sole or her ancestor mortg.d, & then she marries, she has no clam in Ct. at the close of her coverture to make objections to a foreclosure obtained during cov.e -

1 Ves. 251.

If mgee sells a part of the mortg.ed premises to a third person who is in possn, & there is still enough left to satisfy mgees claim, the Ct. will foreclose only as to the remaining part not including in the decree, the part that was thus sold.

Pow. on M. 491. (448.) 2 Br. Par. Ca. 544. III. 1 Ch. 414. 2 Eq. ca. abr. 600. 7 Vin. Ab. 52. 9 Mod. 153.

A foreclosure will sometimes be opened by a Ct. of Ch.y - Thus if a decree for foreclosure has been obtained by any fraud or unfairness of conduct, imposition misrepresentation &c. Ch.y will always open it. Thus suit, if those, obtains both in Eq. & C. - As where mor.r having become a bankrupt, mgee obtained a foreclosure to defraud mgors creditors, it was opened.

In C. mgor when going after the money to redeem, within the time limited by the decree of foreclosure, falling sick, mgee promised to wait a month after the expiration of the time, but afterwards refused to accept the money within the month, the Ct. opened the foreclosure.

Pow. on M. (450.)

So in case of an excessive disproportion between the value of the land & the debt due to the mgee a foreclosure will sometimes be opened, or the time fixed in the decree for redemption will be lengthened out. There is a remarkable case of this kind where it was lengthened out three times, notwithstanding the mgor made an express agreem.t the second time, that he would not ask for a further enlargement. -

Barnard. R. 221. 2 Eq. ca. abr. 605.

Cts. in C. will never open a foreclosure for a disproportion between the value of the land & the debt; but where the disproportion is great, they will refuse to foreclose, unless such reasons exist as in Eng. would induce a Ct. to refuse to open a foreclosure for this cause. In this way Cts. in C. effect the same end as the Eng. Cts. tho' by different means.

After the mgee has been in possession a long time under a foreclosure, Chy will refuse to open it even if there is an inequality between the value of the land & the debt; tho' no precise rule can be laid down about it. In the case in Vern. where there had been some dishonorable conduct in obtaining the foreclosure, it was opened after mgee had been in possession 15 years. In another case it refused to open after a lapse of 5 years. It seems however, that after 20 years they will not open for any cause exc. if fraud.

15 Vin. Ab. 470. 2. Br. Pac. Ca. 544.

2. Br. P.C. 111. 1. Ch. 414. 7. Vin. Ab. 228.

Pow. on Mt. 494. (451.) 1. Ch. Ca. 217. 1. Eq. ca. ab. 317. 4.

There is no instance in which a foreclosure has ever been opened in favor of a meer volunteer.

Pow. 494. (451.) 1. Vern. 48. 2. Ch. 235.

A foreclosure obtained by a first mgee against mgor & second mgee will be opened in favor of such second mgee if the land be afterwards devised by the first mgee to mgor, for the very act of the estates coming again into mgors hands, revived the second mgees equity.

Pow. on Mt. 495. (457.)

It is not customary to foreclose a mortgaged reversion or term for years. The com. practice is to apply to Ch. for a decree to sell the reversion &c. Such mgee, brg. may however, tho' any other be foreclosed. And a decree to sell is seldom granted in case of a reversion, unless the determin. of the particular est. is considerably distant. So if the mortge security is adequate a decree may be obtained to have it sold & the money applied to satisfy the debt, as far as it will go.

Of Interest upon Mortgages.

Pow. on M. 378-9. As a mortge is a security for money, it is within the Stat. of Usury, & if more than lawful interest is reserved ~~or received~~ on the original debt, the mortge is affected by it and rendered void. If the mgor in such case is sued in ejectment by the mgee the ct. being forfeited he may plead the general issue & give the usury in evidence & will this defeat the ejt.

2. Vern. 315. 280. 3. Atk. 529. If there be an agreement made between mgor and mgee that the former shall pay 5 pr. cent. interest & if the payments be not punctually made that it shall be raised to 5 pr. cent. this is considered in Eq. as in nature of a penalty & will be relieved ag. so that the mgor will be holden to pay only 5 pr. cent. at all events.

2. Vern. 134. Pre. Ch. 151. But if this additional one pr. cent. be secured by a bond or covenant the Ct. will not relieve ag. it.

Pre. Ch. 150. 3. Atk. 520. 3. Bur. 1374. & Pow. on M. 422. 380. If the agreem. be to pay 6 per cent. with condition that if the payments are punctually made 5 shall be received, the condition is good & if no com. less with 6 pr. cent. will be allowed. But the larger premium, 5 pr. cent. in the case put must never exceed the legal interest, because if it does it cannot certainly be recovered, as it would be usurious.

3. Br. Par. Ca. 65. 1. P. Wms. 632. In some cases where the mgee has given the mgor forbearance an additional rate of interest has been allowed, but not in that case, so as to raise it above legal interest.

1 Ven. 104. 1 Ven. 314. 1 Atk. 440. 2. Atk. 331. 1 P. Wms. 532. Pow. 439. 30 Ed.

A written agreem.t annexed to the mortg.e to pay compound interest is good if the transaction is fair & unattended with circumstances of oppression such an agreem.t made at the time of making the mortg.e will never be carried into effect. But the mere statement of an account between mgor & mgee tho' it include interest & is signed by mgor does not carry interest on interest without some waiving or renewing of that interest.

1. P. Wms. 652. 4 T. R. Pr. Ch. 500.

Pow. on M. 490. 41.

The rate of interest reserved on a mortg.e may be diminished by a subsequent parole agreem.t but there is no instance in which the interest has been raised by such an agreem.t. This rule seems to be an exception to the rule "that a cont. under seal cannot be altered by a parole agreem.t." Such an agreem.t however is considered as a waiver of the benefit of the written cont. which waiver an obligee in some cases is allowed thus to make as in cases of rent due by specialty. So an obligee has been holden to be bound by a parole waiver of the forfeiture of the penalty of a bond. It is in fact nothing more than giving effect to both agreem.ts at the same time & thereby preventing a circuitous course of justice.

Doug. 3 T. R. 6 Br. Par. Ca. 580.

1. Vern. 159. 2. H. 135. 3. Atk. 271. 3 Ch. Ab. 7 Ed. Pow. 420. (383.)

If mortg.ee sells or assigns the mortg.e with the probation & consent of the mgor the assignee will be entitled to interest on the whole sum due at the time of the assignment from the mgor to mgee, which will a part of it be interest. The mgor will thus pay int. on int. but he is not obliged to pay int. on the int. which accrues after the assignm.t. The above rule does not hold unless the assignm.t be bonâ fide, with the consent of the mgor.

1. Eq. ca. abr. 329. 1. 3. Atk. 271.

Mortgages - Interest.

1 P. Wms. 478. 376. Pre. Ch. 500. 1 Br. Par. Ca. 202. 5 V.

The whole sum found due, upon a comput.n by a Master in Ch.y in a bill to redeem or foreclose, carries interest from the time of the confirmation of the Master's report. This rule admits of an exception in some cases, where the interests of third persons, as subsequent mgees, creditors &c. is concerned. - So it does not hold ag.st an infant mgor. Yet where the mgor is pl.ff or petitioner, as if he petitions to redeem &c. & a cum putation is made & confirmed, this will carry interest, & is binding upon the inf.t unless he can shew fraud or error. - So if the inf.t agrees to allow interest on int. & thus derives to himself a benefit, he will be compelled to pay it. -

3. Atk. 722.
2. Br. Par. Ca. 5.
2. Vern. 302.
4. Br. Par. Ca. 447.
Pow. on M. 434. 438. 389. 394. Co. Lit. 315. a. 1 Eq. ca. abr. 287. 1.

Reasonable improvements made by mortg.ee in possess.n become principal & draw interest. So if he has been at expense in defending his title, yet he must, if it is contested, what he has thus advanced becomes principal & carries int. -

3. Atk. 518.

3. Atk. 518.

If mgor petitions for redemp.n when the principal & interest exceed the penalty of the bond he must pay the whole or lose his redemption. -

Tenant for life of an equity of redemption may be compelled by the remainder man to pay one third of the interest & principal due at the death of the mgor or to quit the premises. - Not so, in case of a tenant in tail, he cannot be compelled to keep down any part of the interest. - Tenant for life must keep down the whole int. accruing during his est.te. -

Pre. Ch. 52. 1 Ves. 48. 258. 3 Atk. Rep. Ca. 69. Cas. on M. 131. 142. (2004.)
1 Ves. Jr. 8. 480. 3 P. Wms. 235.

Mortgages.

Salk. 128. 155. 1 Vern. 150. Pre. Ch. 209.

If a trustee has possession of the bond from mortgr. to mrgee. the former will be justified in paying him the whole principle — If he has only the mortge. and that is insufficient as gives him authority to receive only the interest.

See the effect of order upon the Interest, &c. Eq. 288. a. b.

Of Mortgages as it respects Husband & Wife.

Pow. on M. 310 & 313 31 v. 345. (2 v. 5. 8. 303 & 304) Co. Lit. 31. 2 Atk. 354. 2 Co. Rep. 93. 10. H. 49. Pre. Ch. 13 v.

A mortge. by husb. after marriage does not, in Eng. affect the wifes right of dower unless she joins in the conveyance with him by fine; in which case, she cuts off her dower. But she may redeem, after the husbs. death having her part of the money.

Pow. on M. 112 317. 313. (2 v. 5. 8. 4.) Pre. Ch. 23 v. 15.

If husb. settles a jointure on his wife in mortge. prob. she on his death may redeem. And tho' her estate in the prop. is for life only yet if, on her death the heir claims the prop. settled on her for a jointure he must pay her representatives two thirds of the redemption money advanced by her or they will hold it in pr. ag. him. — Unless the wife joined in encumbering it the heir must pay the whole, i.e. wh. the jointure is other than the mortge. This goes on the ground that a life est. is worth one third as much as a fee. —

2 Vent. 343. Pow. Pre. Ch. 52.

Mortgages.

2. Vern. 683.

If the husb^d lends money & takes a mortg^e in his own name; & that of his wife, he on his death takes it by survivorship, tho' this can never be done to the injury of creditors. In C. she would probably take one half only, there being here no jus accrescendi. And yet on a bond taken in this manner by the husb^d he may sue alone - of course, if there, such a bond would not survive to the wife. -

Pow. on M. 317 a.

Pow. on M. 1288.
1. Atk. 505. 2 Ab. 209.
1 P. Wms. 137 & 2 Ab. 701 con. Pr. Ch. 325.
Pow. 290.

If the husb^ds lands are mortg^ed in fee, before marriage, the wife is not entitled to dower in them. This rule tho' contradicted in 2 P. Wms. 701. is now clearly settled. - It was established when the wife of m^gee in fee had a right to dower: But there is no good reason for continuing it since the m^gee's est. has been determ^d to be merely personal. There is, however no direct case, in which it is decided that the wife of m^gee in fee shall not be endowed. -

Hardr. 455. Cro. Car. 190-1.

1. Atk. 503.

It is also settled that a husb^d may be tenant by the curtesy of his wife's lands mortg^ed in fee, during coverture. All the reasons that would lead to such a decision, it would seem would go to give the wife dower.

Pre. Ch. 133 - 7 1. P. Wms. 137. Pow. 320. 2 86.

If the husb^ds lands are mortg^ed for life or years before marriage, the wife has dower in the equity of redemption & may redeem, because in this case, as the reversion remains in the husb^d he is seised during coverture.

Pow. on M. 303.
2 P. Wms. 127.

A mortg^e by the husb^d of the wife's land is void as against the wife, tho' it, bases all his right to the land; operates in this respect like a conveyance in fee during

Pre. Ch. 238. 1 Vern. 41. Pow. on M. 337. 342 & (3088.)

If she joins w^th, one, with him, in mortgaging her lands, she must redeem the whole if any - And, if m^gee in his life time has paid up any part of the debt, nor has the m^gee has led him have more money, has he made the sum due, as great as the original debt he must also pay these sums also before she can redeem - She is entitled, however, to the aid of her husb^ds personal est. in redeeming, being considered as a creditor for this purpose tho' she is postponed to other creditors.

1. P. Wms. 214. 2. Vern. 589. 2. Atk. 384.

Mortgages.

Pre. Ch. 412. 2 Vern 501. 2 Atk. 444-8. Pow. on M. 348. 350 v. 3 Ld. 9 c. 1 Eq. ca. ab. 58. 1 P. Wms. 458. 3 Atk 10 v.

The interest of a time mortge at the time of her marriage is considered as a chose in action & the law upon that subject, will very nearly apply to her mortge. Thus her interest on the mortge upon her husbd's death survives to her, not however, against creditors of the husbd having notice of the mortge — so, a settlement made upon her before marriage by the husbd is considered as a purchase of her est. in the mortge unless it is expressed to be in purchase of some part of her chose not including the mortge.

Pow. 315. 1. Pre. Ch. 63.

So the husbd during coverture may assign her interest in the mortge; but the assignment will not be good against her, unless made for a valuable consideration — & thus it differs from her other choses in act husbd may assign or release them without any consideration.

Pow. on M. 350. (324.) 1 Tonbl. 308. 1. P. Wms. 301. Pre. Ch. 118. 412. 2 Vern. 401. 2 Cv.

The creditors of the husbd may come upon the wife's est. in a mortge, as upon other personal prop. of the husbd — & the taking of such prop. by his creditors is considered as a disposition of it by himself.

1 P. Wms. 458. 3 Atk. 10 v.

If the husbd & wife survive the est. becomes vested absolute in the wife. Yet on a petition for foreclosure or, I think, for redemption by the assignee, Ch. will not permit the husbd to take the money due on the mortge into his hands unless he will make or obligate himself to make a settlement on the wife; or unless she will come into Ct. & voluntarily relinquish to her husbd all her claim to the prop. —

2 Atk. 420. 2 P. Wms. 315. 382. v 34.

If the husbd is a bankrupt & his prop. in the hands of assignees Ch. will not suffer them to take the wife's mortge without making a settlem. on her.

Pow. on M. 324-5.

If the husbd has assigned the wife's mortge to his creditors, they will hold it without making a settlem. — the case is the same in effect if the husbd has contracted to assign.

2 Vern. 270.

The assignees of a bankrupt in the case just mentioned must make the settlement on this ground;

2 Atk. 207.

1. P. Wms. 383. notes that they cannot obtain the wifes mortge without the aid of Ch^y. & there if they ask for equity they must do equity. it seems considered equitable that when they take her mortge from her they should make some provision for her. – But when the assignment is already made by the husb^d the assignee has no need of a supplying to th^m; &c. – So if the husb^d has agreed to assign for a valuable consider^n Ch^y will consider the assignm^t as executed. –

Pow. on M. 350.
2. Ven. 270.
2. Atk. 207.

This reason will also exempt the husb^d creditors who take the wifes mortge in legal process, from any obligation to make a settlem^t on her.

Of Estates in Remainder.

2 Bl. Com. 164. An est. in remainder is defined to be "an estate limited to take effect & be enjoyed after another est. is determined". The gen.l law upon this subject may be all seen in 2 Bl. Com. 164 &c.

Remainders are either vested or contingent. Vested rem.s are where the est. in rem.r actually passes out of the grantor & rests in the rem.r man at the time of making the grant. Contingent rem.s are where the rem. tho' it goes out of the grantor, does not rest in the grantee until the happening of some contingency, & may be lost if this contingency does not happen. –

Co. Lit. 49. 5 Reb. 94. T. Ray. 151. It is a rule of the Eng. law strictly adhered to, that no freehold est. can be granted, to commence in futuro; it must commence the moment the deed &c. is given. Therefore where an est. is granted to one for life, remainder to another in fee, the est. of the latter commences at the moment in which that of the former does, tho' his enjoym.t of the est. is postponed until the death of the former.

1 Co. Rep. 130. Upon this principle it is that the particular est. to hold, for a cont. rem.r must be a freehold est. for as the freehold passes out of the grantor by the conveyance, & does not rest immediately in the rem.r man, the resting in him depending upon a contingency, the freehold would be in abeyance unless it were in the tenant of the particular est. But in this case it is observable that tho' a freehold rests immediately, yet the fee simple in rem.r is in abeyance: for that is not in the tenant of the particular est. & is not yet vested in the rem.r man. –

The rules for the creation of remainders are the following. 1. There must always be a particular est. antecedent to the remainder. 2. This must always be created at the same time with the rem.r – For, if the particular est. is created before the rem.r is ~~made~~, granted away, the grant would be of the reversion & not of the rem.r ~~&c.~~

Remainders.

And the rem. cannot be granted before the partic. est. as that would be grant. a freehold in future. — B. The remainder must rest in the grantee during the continuance of the particular est. or the moment it determines. —

2 Bl. Com. 167 8.

If therefore the contingency upon which a contingent rem. depends does not happen during the continuance of the particular est. or the moment it determines, the ~~rem.~~ rem. is lost; as if an est. be limited to A. & B. during their lives rem. to the survivor in fee it is good, for in the moments when one dies, the rem. of the other takes effect. but if it be to A. for life, rem. to the eldest son of B. & B. has no son born during A's life, the rem. is void. —

A rem. may be contingent as to the event, upon which it is to rest; or as to the person in whom it is to vest. Thus if it be to A. for life, rem. to the eldest son of B. then unborn; this is conting. as to the person, for perhaps B. will never have a son, & then the rem. cannot take effect. So if it be to A. for life, rem. to B. if he survive A.; here it is conting. as to the event of B's surviving A. —

2 Bl. Com. 169.

Fearne. 280. 291. 435.

A conting. rem. always becomes vested during the existence of the particular est. if the contingency takes place, upon which it is limited. —

The contingency upon which a rem. is limited must be potentia propinqua a probable event, & not potentia remotissima a most improbable one. — Thus if the est. be limited to A. for life, rem. to the heirs of B. he (B.) not being then born; this is considered too remote, for B. must be born, have heirs & then die, all in the life of A. which is very improbable. —

2 Bl. Com. 169-170
Co. Lit. 238. 2 or 5
Co. Rep. 51. Hob. 33.

Any rem. or limitn. tending to create a perpetuity is void, as if an est. be limited to A. for life, rem. to B. unborn for life, rem. to B's issue in tail &c. this rem. would be void, the final limitn. being too remote, & tend. to create a perpetuity.

2 Burr. 241-8. 254.
Fearne. 391. 1 P. Wms. 332. 2 Ch. 5 Br. Parl. 592. 2 Ves. 233.

Fearne. 241. 4. 2 M. Com. 171. 1. Co. 56. 135 1. Sw. 207.

If the particular est. is void in its creation, or if it is surrendered by the ten.t for life, or forfeited, or in any way destroyed, the rem.n whether vested or contingent, falls & is lost with it. — From this hint we originated the expedient of creating trustees to preserve contingent rem.ns — An est. is given "to A. for life rem.n to B. during the life of A. rem.n to C. in fee & his heirs forever" — In this case if A. should forfeit his life est. by the commission of a crime or in any other way, B's rem.n would not preserve the ultimate rem.n during the life of A. & on A's death C's rem.n would take effect. But between the time of the forfeiture by A. & that of his death, B. would hold the est. in trust for C unless the Lord of the fee, seized the est. as he might hold it during A's life, but even in this case C's rem.n would rest on A's death.

+ 2u. as to — vested rem.n Co. Lit. 298. Fearne 207. 234. 261. —

1. Ves. 222. 4. Burr. 2425. n.

If one rem.n or conditional limit.n be removed out of the way, a future limit.n will take place — 2u. If the rem.n or limit.n which does not take effect be void in its creation —

Fearne. 292-5-7-8. 421. Cro. Eliz. 345. 1. Rol. 510. 8. Reb. 94. 10. Rep. 9. 1. P. Wms. 1. 2. Ves. 511. 3. Atk. 398. Carth. 344. Comp. 234. 3. T. Rep. 487. 753. 2. Wood. 222. 2. Bl. Com. 1724. 1. Ld. Ray. 208. 2. Saund. 388.

An Executory Devise is an est. created by title to commence in futuro, not vesting in the device immediately on the testator's death; and it is such an est. as cannot be created by deed; for if it could have been created by deed, it is a remainder & not an ex.y devise, altho' created in a will — And it is a rule of construct.n adopted by the Cts. that if such a devise can be construed as a remainder it must, if it can — not, in order to give effect to the testator's intention it will be considered as an executory devise —

2. Bl. Com. 173. 1. Ld. 753. Salk. 229.

An Ex.y Devise differs from a rem. in three particulars 1. It needs no particular est. to support it, as if an est. is given by devise to one & his heirs on the day of his marriage, this tho' it would be void by deed as the est. is to commence in futuro, & there is no partic. est to support it till it does commence; yet by way of ex.y devise it is good. 2. By ex.y dev. a fee-simple or less est. may be limited after a fee; as, if a man devise to A. & his heirs; but if he die before the age of 21. then to B. & his heirs; this is a good ex.y dev. tho' it would be void by deed. — 3. A rem. of a chattel-interest may be limited after a life-est. in the same. This could not be done by deed a com. law because a life-est. is always considered as greater than any term for years whatever, & a life est. being once granted away in such a term the grantor had parted with all his interest — By way of ex.y dev however this is admitted, for it is evident there may be a rem. after a life est. in a term for 999 years.

2. Mod. 289.

8. Reb. 95. 2. Atk. 312. 1. P. Wms. 1.

The doctrine of ex.y devises was created by the Eng. Cts. & has been adopted by the Cts. in Va. It originated in the time of Elizabeth but was illy understood till a much later period.

3. T. Rob. 93-5.

Where there is an ex.y devise of real est. the freehold descends if not otherwise disposed of to the heir of the devisor, till the devise vests.

Fearne. 432.

Executory Devises. -

2. Bl. Com. 173-4. Talb. 27. 2. Atk. 362. 3. Atk. 287. 1. Br. Ch. 14. Ven. 200. 320. 355-5. 8. Co. 95. 3. P. Wm. 358.

When an est. of freehold is created by way of exec. devise to commence in future without any antecedent particular est., or when a fee is limited on a fee, the contingency upon which the est. is to vest must happen within a life or lives in being & 21 years afterwards; thus an est. may be given to A's eldest son unborn when he shall arrive at 21 years of age; but if it should be to A's grandson, he then having no child, when he should attain 21 years it would be void, as tending to create a perpetuity. And if according to the terms of the devise the contingency may possibly happen at a more distant period, the devise is void in its creation.

Fearne. 1. 6. 306-9. 314-20. 353-7. Cro. Jac. 590. 3. Rep. 143. 10. Mod. 419.

If therefore an est. is given to A & his heirs forever, & if he dies without issue, then to B. &c. the ex. devise of B is void; for by the words "dying without issue" is meant a general failure of issue, at any time whatever, & which may happen 100 years after the death of the ancestor. - If however it can be inferred from other words in the will, that the phrase was used by the devisor in its usual, vulgar acceptation, B. might take in the event of A's having no heirs at the time of his death; but, if there are no other such words the phrase will be taken in its legal acceptation.

2. Atk. 314. 375. 308. 1. P. Wm. 432. 3. H. 255. 2. Show. 11. 3. Mod. 237. 6. Bro. P.C. 5. 4. Bur. 2165.

When the rem. of a chattel interest is limited after a life est. the ultimate rem. man must be in esse, and the contingency, if any, must happen during the life of the first devisee; (this is to avoid the dangers of perpetuities.) and the same construction is given to the words "dying without issue" as in the cases of a freehold to commence in future & for limited on a fee. When there is such a rem. of a chattel int. limited over, in the event of "one's dying without issue" & there are no other words to qualify the legal import of the phrase, the whole int. vests in the first taker. But if the est. so devised were a lease for lives, the rem. tho' void as a rem. would not of course vest in the first taker, but if he neglected to dispose of it during his life it would go to the rem. man as the real occupant.

2. Bl. Com. 174-5. 2. Atk. 314. 375. Talb. 27. Co. Lit. 241. 2. Ewins. 720.

Fearne 341-4. 399. 415. &c.

1. Ionb. 289. 2. Atk. 375. Fearne 300.

313 a.

Executy. Devises. Remainders &c.

Fearne 391.

In limitns. of personal est. Cts. incline to restr the words "if he die without issue" to their vulgar meaning, not to in limitns. of real est.

A rem. when once vested tho' never enjoyed, is descendible to the heirs of him in whom it thus vested. According to ext. writers this appears to be clear but direct decisions are wanting. According to the old law on this subject, Poss. bilities were not transmissible.

Fearne 444. 285. 291. 439.

As to the two first kinds of exy. devises viz. when a fee is limited on a fee, when a freehold is given to commence in futuro it is settled that they are transmissible tho' not enjoyed by the exy. devisee. & that the exy. devise is transmissible on the contingency happening, even tho' the exy. devisee dies before it happened, & consequently before even the interest vested in him. Whether this rule applies to the third kind of exy. devises, when the rem. of a chattel int. is limited after a life estate is not settled by any direct adjudications. If the rem. is not contingent there is no doubt that it may be devised.

8 Rep. 94. 1 P. Wms. 574.

2 Atk. 29.

Salk. 117. 2 Term. 348. 3 P. Wms. 418.

1 P. Wms. 572.

A contingency annexed with an interest is descendible & devisable, a bare possibility that is not annexed to no interest but merely a possibility of inheriting is not (has it ever been settled that they can be a chance?) Thus cases in Equity. Fearne. 441-4.

1 Fonbl. 201 & q. 203. 3 Burr. 93.

Wms. 310 a. 340.

Of Reversions.

2 Bl. Com. 175. Co. Lit. 22. 143.

A reversion is the interest which one has in an est. to commence after the determin.n of a particular estate granted out by him; it is always created by a reration of law, & exists in every case where one having an est. grants out a less est. to another; as if ten.t in fee grants out an est. for life the reversion is in him, & he takes the est. after the est. for life is determined; so if ten. for 20 years grants out an est. for 20 years there is a reversion which remains in him. – When a fee is limited on a contingency it remains in the grantor till the contingency happens.

3 Plowd. 236. Saxe. 50 Ed. 3. Dow. on 11. 4. 3. ex.n

A reversion is a fee in the hands of the heir & may go aq.t quando accederit. The reversion expectant on a feeland is in fact so remote (as it may be cocked at any time by the ten.t) & consequently into a fee simple that it is not in law esteemed valuable.

Of Joint-tenancy.

An est. in joint-ten.y is always acquired by purchase, i.e. either by deed or devise. And both or all joint ten.ts must acquire their title at one & the same time, by one & the same conveyance, they must have one & the same interest in it & hold it by one & the same undivided possession. These are the four unities requisite to an est. in joint-ten.y & if any of them be destroyed they are no longer joint-ten.ts. — The incidents of an est. in joint-ten.y are principally from the above properties. Thus in an action by or agt. joint-ten.ts respecting their joint-int. they must all be joined. & as the int. & poss.n of one is considered as that of both, they cannot maintain trespass agt. each other: at com. law they could maintain no act.n whatever agt. each other but in that they are permitted to sustain another case act.n & waste or account. But the principal & distinguishing incident of an est. in joint-ten.y is the jus accresendi or right of survivorship that takes place between the joint ten.ts & totally when the death of one the whole est. goes to the other. This is expressly abolished in Ct. It may be questioned whether an est. in joint-ten.y is recognized by the law of Ct. In New-York it is admitted but in order to make such an est. the words must be express, contrary to the Eng. law which construes an est. given to several as a joint-ten.y unless the words clearly indicate a contrary intention.

2. Bl. Com. 180.
Co. Lit. 188.

2. Bl. Com. 182.
Co. Lit. 211.

Ved. 315.

2. Bl. Com. 185.

An est. in joint-ten.y may be severed by any thing which destroys any of the unities which constitutes it as alienation of his part by one of the joint ten.ts or partition between themselves which now lay that one may compel the other to make. —

Wife of joint-ten.t is not entitled to dower, or tenant by curtesy.

5. Dwin. 954. 2. Lin. 120. 2. Sev. 29.

If wife of one joint ten.t must cannot be prevented without consent of the wife, over the jointure.

Of Coparcenary.—

2. Bl. Com. 188. In ct. in coparcenary always arises by descent & in all cases where lands descends to two or more heirs, they are coparceners & held in coparcenary. All the parceners make but one heir, & consequently all ought to have the fee as such, but a dis.n has been held in C. that one might be heir alone. It is not necessary that the

2. Sid. 153.

2. Sid. 154. title of all the parceners should have commenced at the same time; for if one of two parceners dies, & the lands descend to his heirs they are parceners with the survivor. — Parceners cannot maintain trespass or waste

2. Bl. Com. 188. ag.t each other tho they may an act.n of Account.

In Ct. in coparcenary may be dissolved either by alien.n of one parcener, or by partition which may be made by consent or by compulsory process.

Of Tenancy in Common.

In all other cases than those mentioned above in which there are several owners of real prop.y they are tenants in common. The only unity in a tenancy in com.n is that of possession & is the only link which connects the several owners. Tenancy in com. may be created by any alienation or act. in joint-ten.cy or coparcenary, it will does not lose the qu.y of the tenants; or it may be created by words in a

2 Ver. 52. 1 Pl. Com. 1.a 3 Reb. 34. 1 Cont. 32. deed or will. The words "to A. & B. jointly" or "equally" or "to A. & B. to be equally divided" have been held in a deed to create a joint-ten.cy tho in a will they would be construed as creating a ten.cy in com. said 2 Bl. Com. 193.—

Act.n of trespass will not lie by one ten.t in com. ag.t another, unless the thing held in com. is entirely destroyed in which case it will — Act.n of waste & account lie by stat. (not trover in case of personal things Comyns 150. & 1 Roll 240.)

4 Co. 35 S.

2 Bl. Com. 194. If one ten.t in com. actually turns the other out, ejectment lies to put the one turned out into poss.n tho not to turn out the other, because he has a right to stay there.

Co. Lit. 200. 3 Bac. Ab. 210.

As the respect.n of one is that of the other, one cannot acquire a title to the whole, by poss.n unless his poss.n was adverse which may be proved by circumstantial evidence as well as by proof of an actual ouster.

Comyn. 21.

Ten.y in com. may be dissolved by uniting all the titles & interests in one of the ten.ts or by partition, which might formerly be made by parole tho qu. whether it can now, since 29 Car. 3 Frauds & Perj.y.—

2. Bl. Com. 241.

Real property may be acquired either by purchase or by descent. Purchase comprehends every other method of acquiring it except by descent, as by Devise, by Lease or by Execution. –

I. Of Purchase by Devise. —

2. Bl. Com. 373.

The right of devising existed among the Saxons but was abrogated by the feudal system — The right of devising real prop^y, as it now exists in Eng. was founded on the Stats. 32^d & 34th of Hen. 8. the latter of which entirely explains the former, and the Stat. 12. Car. 2. which by converting military into socage tenures, gave a still farther force to this species of conveyance of real pro. Before the Stats. of Hen. 8. the right of bequeathing all one's personal prop^y by will had become established. This however was effected by gradual inroads upon the feudal system which in its original rigor admitted of a

2. Bl. Com. 441. 2.

disposition by will of only one third of a man's personal chattels. – Uses were also unknown before those Stats. tho as there were virtually evaded by the Stat. 27. Hen. 8. 1 decision of Eqy. which was well known, from that time to the Stat. 32. of the same reign. –

The Legislature of C. has enacted the Stat. of Hen. 8. substantially & hence the 6. Car. 2. & that construction on those Stats. are generally adopted here. – By the

Stat. of C.

Stat. 329.

all persons not legally disqualified may devise any interest in a freehold est. – By persons legally disqualified are meant, Mr. C. has shewn, such persons as were incapable of devising devisable (i.e. personal) prop^y at com. law, for the "legally" can only be nothing but com. law & at com. law no prop^y was devisable but personal prop^y. By the Stat. Hen. 5. joint tenants are not permitted to devise their estates; but as the Stat. of C. uses the general terms

Id. 344. a.

all persons having lands &c. may devise, they are included in it & the thus acquiring a right to dispose of their joint-prop^y the deprive the right of survivorship is cut off. –

The Stats. of Hen. & the Stat. of C. comprehend also

Pow. on D. 35. 233-4.

not only estates in possession, but those in remainder or reversion.

Devises.

Pow. on Dev. 13. 15. 1st. Finch. 195. 1. Mod. 117.

Any disposition of a man's estate to take effect after his death is a will, tho' made in the form of a deed & delivered as such.

1. Bur. 548. 1. Show. 525 & 553. 6 G. Eq. Cas. Abr. 721. 1. Ves. 187. Comb. 2.

Wills may be written at different times & visibly, as the same portions of prop. may be bequeathed by distinct writings, all of which will form one will; but if there is any inconsistency between them the latter must prevail, it being considered a revocation of the former pro tanto. — Mr. R. thinks that in many cases it ought to operate as a complete revoc. of the whole as it manifests a disposition in the testator to make a new disposal of his prop. generally & not merely as to part. — A codicil is never only a revoc. pro tanto.

Cro. Jac. 144. 2. Atk. 303. Comy. Rep. 381. 1. P. Wms. 530. 3. Bur. 1775.

If a will refers to another writing not recited, but sufficiently identified the latter becomes a part of the will. Qu. in all cases? 5. Durnf. 92.

Wms. 313. a. 340. 1. Bl. Rep. 222. 605. 1. Ken. Bl. 33. 4. 3. Durnf. 88. 4. Br. 248. Pow. on D. 34. 235. 497. 1. Cobb. 208. 209. 1. Ves. 231.

It is now settled that a contingency coupled with an interest, may be devised before the interest vests; as if an est. be given to A. in fee but if he die without heirs before the age of 21, then to B in fee. B. may devise his int. in this est. before the death of A.

1. Ves. 223. 422. Pow. on D. 35. 45. 183. Cro. Car. 387. 405.

If an est. is granted in fee to A. & with condit. that unless grantee does a certain act, grantor may re-enter this contingency has been adjudged not devisable, as being not within the purview of the Stat. 32 Hen. 8.

Pobh. 91. Cro. Eliz. 55. 1. Ves. 428.

Estates pur auter vie are not devisable by Stat. Hen. 8. but by Stat. 29. all a man's int. not merely his fee simple is devisable. By Stat. 29. Car. 2. such an est. is also devisable in Eng. where there is a special occupant.

2. Bl. Com. 259.

2. Atk. 375. Carth. 375. 3. P. Wms. 303.

But an est. "to A. & his heirs for the life of B." is not devisable the heirs of A. taking after his death, as heir as under the deed.

Of the requisites to a devise of real prop.

Pow. on Ed. 53. 2. P. Wms. 5. 291

A will, tho made in a foreign country, in order to pass lands lying in Eng. must be executed according to the laws of Eng. So, a will made in Eng. tho' it be not execu according to the Eng. requisites, yet if it has the requisites of the country where the land lies, it is sufficient.

Ibid. 331. Pow. 577. 1. P. Wms. 40. 2. H. 258. 2. Ves. 179.

Where one has given another a power to dispose of his lands by devise, both the power, & the devise, which is the execution of it must have the requisites of a will, the final devise, in this case, being considered as taking by virtue of the power.

2. Rd. Con. 370. Pow. on Ed. 90. 95.

The requisites to a good devise are that it be in writing signed by the testator himself or by some one in his presence expressly authorized by him. Attested by three or more credible witnesses, who then subscribed in his presence. - These requisites are made necessary by the Stat. 29. Car. 2. which is adopted in Va.

3. Lev. 1. 3. Mod. 240. Co. on Ed. 90. 2. Str. 704. 2. Atk. 179. Ld. Ray. 313. Buls. 263. Cowp. 180.

The name of the testator written by himself in any part of the will is a signing. Even leaving by the Ecc. Ct has been said to be a suffict signing but this seems now to be settled otherwise. - If it can be proved that the name inserted in the will was not intended for a signing or if it can be proved that he meant to have signed it at bottom but neglected to do it, the will is not properly executed. Mr R. thinks it would have been well if it had been determined that the testr's name should appear at the bottom in all cases.

Doe 24. Wright vs Price.

Pow. 74. 2. Ves. 455. Pr. Ch. 184. 3. P. Wms. 253. 1. Ambl. 182.

An acknowledgment by the testator to the witnesses that his name in or subscribed to the will was written by himself will be good proof of a signing within the Stat.

Proof of such a declar. as this by testator "This is my will &c." is not sufficient evidence of signing unless the instrum. is proved to be all in his own hand-writing; if this also be proved the evidence of signing will be sufficient.

Pow. 73. 2. Atk. 182. 1. Ch. Doug. 244.

Devises.

2 Pow. 784. Comy. Rep. 197. 3. P. Wms. 254.

A written declaration made at the bottom of the will by the testator "that he signed his name" &c. is good evid.ce to a jury, not perhaps to a Ct. of signing if it be proved to be the hand-writing of the testator.

3. Atk. 150. Swinb. 32. Com. Rep. 197. 8. Vin. 125. Pow. 80.

In Eng. a publication of the will distinct from signing was necessary under the Stat. of Jac. 8. & this not made a requisite by the Stat. of Car. 2. is still considered by the Cts. But any slight act or declar.n by the test.r will amount to a public.n as the words "a be notice". Delivery alone has also been holden a suff. public.n.

Pow. 68. 2. Atk. 50. 3. P. Wms. 23.

The subscribing witnesses are to attest not only to the fact of the test.rs signing, but also to the sanity of his mind; & merely the names of the witnesses at the bottom of the will is presumptive evid.ce that he was of a sound mind, but it is by no means conclusive. Other witnesses may be adduced even the subscribing witnesses themselves, to shew that the test. was insane.

2. Str. 1095. 1. Bl. Rep. 365. 1. Bur. 2224. Wms. 302.

3. Bur. 1773. 3. Mod. 263. 1. Ch. Rep. 40. 422. Wms. 318. 321.

The whole of a devise which is to be authenticated by subscribing witnesses must be present at the time of their subscription or the attest.n will be insufficient; tho' the presumption will be that it was present unless the contrary is shewn.

1. Mon. 80. Ark. 395. 588. 1. Br. Ch. Cas. 1. P. Wms. 239. 2. Mon. 288. Ark. 7. 81. 1. Cowl. 58.

The witnesses must subscribe in the presence of the testator, i.e. in his possible view. It is not necessary that he should have seen them; if he could have done so the attest.n is sufficient.

1. P. Wms. 240. Pow. 95.

A clandestine signing by the witnesses the within the test.rs possible view is not sufficient.

2. Ca. 241. Right vs. Price.

So if the testator swarms insensible before the will is attested by the witnesses, the attest.n will not answer. It must be subscribed in his mental as well as corporal presence.

Devises.

Pow. on D. 98 4. Comy. Reb. 531. 2. Str. 1109. 8. Vin. 128. Fitz. 32 7.

When the witnesses to a devise are all dead proof of their handwriting only is a suff.t authentication of the instrum.t. This, however, is admitted on from necessity, for it is no proof that they subscribed in the presence of the testator, this fact is left to be inferred by a jury.—

Pow. 48. 101. 103 4. Carth. 35. Comb. 174. Comy. Reb. 384. 1. Show. 95.

The number of witnesses to a devise must be "three or more". If the devise is signed by two & a subsequent codicil by two more, the attest.n is not suff.t unless, he hals the will itself is present at the attest.n of the codicil. And even in this case the attest.n as to the codicil is not suff.t.—

Pow. on D. 15. 8.v. 103. 5 4. Pre. Ch. 2. 7. 2. Vern. 59 7. Fitz. 31 7. 32 5.

If there are several sheets, & three subscribing witnesses each on a distinct sheet, or all on the last the attest.n is good, provided all the sheets are present at the several attest.ns. So, if the will was written at different times law is the same. If the will has no witnesses, & the codicil has three or four, yet the devise is not good unless it was present when the codicil was attested, altho' the latter referred to it & counted upon it.

1. Bur. 548. 3. Ath. 1 v. 3. 2. Bl. Rep. 40 7. 522. 454.

It is not necessary that the witnesses should sig. in the presence of each other but it is most safe. For the oath of one witness is suff.t to prove that all were in the testator's presence when they subscribed, but unless all were present together this proof cannot be thus made. And while one is living the hand-writing of the others cannot be proved. If therefore, two are absent, & the one called in not to testify did not subscribe in their presence, there is no way of proving that they subscribed either in the test.rs presence or at all.—

2. Vern. 424. Pre. Ch. 154. 2. Atk 177. 2. Ch. Ca. 109. 1. Pl. Com. 741. 1. Forbe. 184. Pow. on Dev. 110 4.

Com. Rep. 91. 12. Mod. 505. Carth. 514. Pow. D. 114.

It was holden by the Eng. Cts. under the Stat. Car. that if a devisee or legatee was a witness to a will he could not testify to authenticate it, on the score of interestedness. But it has been a much litigated question, whether a devisee &c. could testify to substantiate the will, after his interestedness was removed by bar.n of the legacy, release &c. The authorities are directly contradictory. There are two decisions in favor of the opinion that he might, & one directly ag.st it, but the number of

Pow. on D. 110. 4.

2. Atra. 1253. 1. Bur. 414. Pow. on D. 128. 13 C. Burn's Ec. Law 93.

1 Ves. 503. 2 Ib. 374. Pow. 122. Judges on each side of the question is equal. But, now the law in Eng. is regulated as to these points by Stat. which enacts that if a legatee &c. be a witness, his legacy &c. shall be void; so that being not interested he is now a competent witness. The same Stat. declares that creditors are competent subscribing witnesses. As there is no Stat. in C. the law remains as it did in Eng. before the Stat. and it is quaestio vexata.

Doug. 134.

Of Revocations of Devises.

Wills before the death of the test. are said to be ambulatory, i.e. in an unsettled state; his death consummates the devise, but before that event he may at any time alter or revoke it.

Pow. on Dev. 532. 2 Bl. Com. 376. 1 Rol. 615. Cro. Jac. 115. Gyer. 310.

Revocations are express or implied. Before the Stat. 29 Car. 2. express parole revoc.ns of written devises were good; but according to that Stat. nearly the same formalities are necessary to an express revoc.n as to a devise itself — That Stat. does not extend to, or affect implied revoc.ns.

Cro. Jac. 115. Cro. Car. 51.

Words of revoc.n at com. law must have been animo revocandi; not in a passion, or in a loose vague manner. The calling of witnesses to bear testimony to a parole revoc.n or any other circumstances which evinced a fixed & deliberate resolution to revoke, would be a revocation.

1 Sid. 213.

Devises. — Revocation

Cro. Eliz. 305. Moor. 8 Cro. Jac. 497. — Expressions of an intention to revoke in future do not amount to a parole revoc.n at com. law.

Our imitation of the Stat. 29. Car. 2. has been taken out no requisites of an express revoc.n of a devise. It may therefore become a question how far a com. law revoc.n by parole &c. is good in C. (For express revoc.ns under that Car. vid. 32.

Implied revoc.ns may be inferred.

+ Vid. 70.b.

Pow. on D. 554. 4 Con. 2 Fonbl. 353. 4. Bur. 2171. 1 P. Wms. 304. 4. Bur. 2152. 3. Wils. 515. Amb. 490. 557. — 1. From a change or alteration of the testator's relative personal circumstances as from marriage & the birth of a child subsequent to the devise. Such a change is considered as inconsistent with an intention in the test. to continue his devise. This presumtn. may be rebutted

Doug. 35. Brady vs. Pabst. — by parole evidence since it is but an equity.

5. Burn. 49. 57. — The principle upon which marriage & the birth of a child are determined to effect a revoc.n seems to be not any actual intention, which the Ct. will presume the test.r had in his mind to revoke, but a presumption that no man would wish to die & leave a family unprovided for. If therefore, the test.r marries after has devised away his est. & has no child.n this is no revoc.n because his wife is always provided for by her dower & but if in such case he has a posthumous child born it a revoc.n; in this case no intent.n to revoke can be presumed to have existed in the test.rs mind, for he might not have known that he was about to have a child.

See 2. Fonbl. 336, where he contends that marriage alone, or the birth of a child alone, ought to effect a revoc.n at least of a will of personal estate.

1. Eq. Ca. abr. 413. 15.

5. J. Rep. 57. fed vid. 2. Show. 242. Pow. on Dev. 550. Doug. 38. note 10. the Jend vs. Shelford. — Birth of a child alone is not a revoc.n. So if test.r has a large est. besides that which he has devised away, a subsequ.t marr.ge & birth of a child will be no revoc.n because there he will have his family provided.

4. Reb. 51. 2. P. Wms. 624. 2. Wil. Com. 410. 2. Burn. 689. Powel 343. — If a feme sole devises, & then marries, & dies before her husb.d, her devise is of course revoked. But, if she survives her husb.d, her will stands good unless she revokes it.

Devises. – Revocation.

1. Vern. 105. 4. Co. 56. Pow. 564. 1. Tonbl. 45.

If a test. after making a devise becomes insane, his devise continues good. – 2u. If during his insanity his circumstances are much altered. vid. 5. Dean. p. 119.

3. Wils. 511. 512. 3. Mod. 205. Pow. Dev. 535–6. Cowp. 90.

2. An implied revoc. may also be effected by a subsequent devise of the Prop.y inconsistent with the first. As the last will is always to prevail if it is inconsistent with the first it effects a revoc. of it – and it is said that if a subseq.t will is partially inconsistent with the first it is a total revoc. is affording evidence that the test. was displeased with his former will & meant to make a new disposition of his Prop.y (2u. as to this principle? tho' if this rule is admitted the disposition of the Prop.y in most cases will be the same as if the first will had stood because if the 2d is only partially inconsistent with it, it is as to the rest consistent with it, & all the difference will be that the devise will take by the 2d will instead of the first).

Pow. on Dev. 543.

*2u. vid. Cro. Eliz. 721. 1. Ves. 187. 2. Atk. 205.

But if the two wills are consistent (throughout) they stand together. – If test. devises in one part of the instrum.t to A. & the same Prop.y in a subseq.t part to B.; A. & B. take jointly.

3. Mod. 203. 1. Show. 537. Cro. Eliz. *721. 1. Tenor. 444.

In a case in which the jury found that the test. made a second will inconsistent with the first but in what particulars they knew not, it was finally established that the first should stand good.

3. Wils. 497. 2. Bl. Res. 937. Cowp. 57. 7. Br. Par. Ca. 344. sed vid. Hard. 374. 3. Mod. 203. Salk. 592. 1. Show. 537.

But a partial inconsistency between a devise & a codicil, is a revoc. of the former pro tanto only. i.e. the whole devise is to stand except just so far as the alterat.n made by the codicil go, & as if test. devises lands in fee to A. & afterwards by a codicil gives the same to B. for life. – 2u. If this subseq.t disposit. were by devise would it be a revoc. of the first in toto? *It is not, as it affords no evidence of an intention in the testa. to make a new disposit.n of his est. & is it in fact, inconsistent with the first?

Pow. on Dev. 543 4. 1. Ves. 1.r 8. 180.

*Vid. Cro. Eliz. *721. Pow. 15. 3. Wils. 511.

Devises. Revocations.

Pow. on D. 540. 4.

If a testator is induced to make a second will or devise, inconsistent with the first, by a false impression as to facts the first will stand in preference to the second: and to prove such false impressions parole evidence is admitted. But an erroneous opinion as to a point of law will not invalidate the 2d. devise.

4. Bur. 2512. Cowp. 49. Pow. D. 550

If a second will impliedly revoking the first, be itself revoked the first is re-established unless it be destroyed or cancelled. But if the second, expressly revokes the first, a revoc. of the second does not revive the first. (Qu. Is this distinct. well founded? for the revoking clause in the second devise is itself revoked.) —

Cowp. 49. 53. Doug. 40.

2. Lev. 168. Pow. on Dev. 553 & on.

1. Rol. 515. 515. 514.

1. Show. 112-3.

1. Atk. 575. 1 Ves. 420.

2. Atk. 325. 3 Wils. 1.

5. Leon. 129.

3. Lev. 168. 3. P. Wms. 163. 1. Rol. 614. C. 3. Pow. 580.

Moore. 89.

2. Atk. 579.

3. Atk. 803-4.

2. An alteration of the estate devised away, made by the devisor after the devise, is an implied revoc. of the devise; as if tenant in fee after having devised land should alien to another, & take back a conveyance in fee, still this would be a revoc. — So if after having made the devise he should make a settlement of the devised premises upon any one, but with remainder to himself or his heirs in fee, still it would be a revoc. — And this idea has been carried so far, that even an alteration made with an express design of carrying the devise into effect, has been construed to effect a revoc. of it; as where tenant in tail having devised his est. suffered a recovery in order to give himself a fee, so that his will might take effect yet it was held that this was a revoc. — And the Cts. have gone still further than this & held that if a test. devises an est. which he actually holds in fee simple, & afterwards supposing it to be entailed, suffers a recovery; this unnecessary attempt to alter the substance nature of the est. is considered as an implied revoc., because the test. does not nominally hold the est. by the same title he

did when the devise was made. It is easy to see that the intention of the testator, which is generally to govern in all questions respecting devises is wholly disregarded in this class of cases. It is laid entirely out of consideration, & the only question for the Ct. to decide whether is whether any the last alteration in the nature of the est. was intended, ~~[illegible]~~ and not whether the test.r intended to revoke his will: if he meant to alter his est. the will is revoked, whether he meant to revoke it or not, nay, if he expressly meant to give it effect by such alteration. The motive that induced Cts. to put this reverse construction upon the clearly intelligible acts of the test.r was the uniform & constant obsequiousness therefor in favor of the interests of the heir; he is the favorite of the Eng. law, & in order to disinherit him by devise the testators intention to do, must appear to have been constant & fixed from the time in first entertained it till his death, & all his acts relative to the disposition of his est. after his death must be consonant to this intention & tend to conduce thereto. But even if we give this enlarged scope to the operation of these principles it is difficult to see the reason why the devisee should not take when the test.r acts are all of them clearly done with a design of giving the est to him; and in Ca. where the same anxiety for the interests of the heir does not prevail as in Eng. and where the acknowledged principle of construction and interpretation as to devises, is to regard principally & primarily the intention of the testator, it may reasonably be doubted whether the above rules as to the alter.n of an est. e. fleeting in all cases a revoc.n of the devise, should prevail. —

Pow. on D. 503

Pow. on D. 505-5.

There is an exception to the above rule in the case of mortgages; the mortgaging in fee or for years of an est. before devised, being considered in Equity, as a revoc.n pro tanto only; tho' at law, a mortg.e in fee is a revoc.n in toto. But even at law, a mortg.e for years is a revoc.n for the term only, & in Equity pro tanto, i.e. for the money borrowed. Tho' a mortg.e made subsequent to a devise, to the devisee himself is a total revoc.n of the devise. —

Pow. on W. 15 (13). Pow. on D. 514 Dr. 1 Term 329. 342. 1 Sch. & L. 2 P. Wms. 544. 1. Salk. 158. 3. Atk. 48. 805. 2. Ld. Ray. 957-8. 8. Term. 46. 150.

Pre. Ch. 514. 3. P. Wms. 7.

Devises. – Revocations.

3. Pl. Cms. 1. C. 2. Com. 5. Eq. 1. Wms. 311.

A purchase of the legal title to bro. by the cestui que use, or cestui que trust, at the a technical alter. of the est. does not revoke a former devise of the bro. by him. But a purchase of the use, by him who has the legal title is a revoc. of a devise made by him. –

Pow. on D. 502. 4. T. Ray. 240. 3. Pl. Cms. 170. note 3. – Salk. 351. 3. Keb. 357. 1. Wms. 304. 3. Atk. 42. – 5. – 50.

So a mere partition of an est. held in common, is no revoc. of a former devise of the same bro. But, if the conveyance by which a partition is effected has for its object an other, in position than a mere partition of the est. it revokes the former devise. –

Pow. on D. 524. 1. Ros. 575. Ro. Inc. 49. Cowp. 90.

So, a lease for years made to a third person out of an est. before devised in fee, is both in law & equity, a revoc. for the term only; because, there being no specific charge or sum of money to be raised, it cannot be as in the case of a mortge. for years, a revoc. pro tanto. – If the lease be made to the devisee himself, to commence after the death of the devisor, it is a total revoc. for such a lease is wholly inconsistent with the devisee's taking a fee under the devise. –

Cro. Jac. 49.

Pow. on D. 519. Pow. on M. 13. 17. (13. 14.) 2. Atk. 272. Pre. Ch. 32. 2. Com. 241.

So a conveyance of a devised est. to trustees, to pay debts is a revoc. to the amount of the debts and, tho' it would seem to be a total alter. of the est. And, the devisee may in this case, if he chooses, pay the debts & take the est.; for, this conveyance is for a special purpose only. (But how can it be reconciled to the rule?) –

Devises. Revocations.

Pow. on D. 505. 4. Moor. 429. 409. Popph. 108. 1. Rol. 615. 1. Ves. 178. 1. Bro. P. Ca. 550.

An intended alteration in the disposition of the est. devised is a revoc^n of the devise — this goes on the ground of intention in the devisor, it being presumed that he would not have thus disposed of his prop^y if he had not intended to deprive the devisee of it. ex. gr. a bargain & sale, not enrolled according to law & of course not effectual, is still a revoc^n of a former devise of the same prop^y. — The effect is the same, if on alien^n, the en^t failed to attorn, attornm^t being necess^y at com. law to complete the title; or, if settlement were made without livery — or if the conveyance were made to a grantee incapable of taking, as, a corporation, or by a man to his wife &c. — In all these cases, the subseq^t attempt by the test^r to alter the disposition of the prop^y devised, is a revoc^n effected by the presumed intent of the devisor: But, this presum^n being an equity (for these imperfect conveyances have no legal efficacy) may be rebutted by parole, evid^ce. —

Pow. on D. 607.

Pow. 511. 3. Rep. 35. 1. Rol. 515.

A right of entry, cannot, in Eng. be devised: tho' if devisor is disseised, & dies disseised, the devise is revoked. This law is not applicable in C. because actual seisin is not necess^y. —

1. Rol. 378.

A disseisin by coverture is no revoc^n. —

Pow. 183. 511. 11. Rep. 51. Salm. 205.

But if after disseisin the devisor reenters & dies seised, the devise is revived: For, he is then, by intendm^t of law, considered, as having been constantly in possess^n.

Devises. Revocations.

Pow. on Dev. 629-30

Express revocs. under the Stat. 29. Car. 2. must be effected, either by a subsequent will or codicil or other writing declaring the test.rs intent.n to revoke signed by him in the presence of 3 witnesses, or by burning cancelling tearing or obliterating the will. — This does not affect implied revocs. which stand as they did at com. law.

Cary. 81.

Under this Stat. it has been held, that a subsequent will or codicil, in order to effect the revoc.n of a prior one, if it was intended by the test.r as a disposing will must be duly executed as such or it will not revoke the former even tho' it have all the requisites of a revoking instrum.t under the last clause of the Stat. viz. being signed by the test.r in presence of 3 witnesses. So that a subseq.t will containing a disposition of Prop.y if it be not subscribed by witnesses in the presence of the test.r which it must be in order to be a good disposing will, will not revoke a former will altho' it be subscribed by the test.r in presence of 3 witnesses; which, if it did not contain a disposition of Prop.y but was intended merely as a revoking will, would be sufficient. —

Pow. on D. 632. 643.
3. Mod. 258. 1 Show. 89.
Cart.r 79. 1. Plms. 343-4. Pr. Ch.y 459.
2. Lem. 441.

Burning, cancelling &c. are revocs.n as much at com. law as they are under the Stat. Car. — In determining whether a burning &c. is a revoc.n it is necessary to discover quo animo it was done, & for this her love, declarations &c. is admissible — If there is the animum revocandi the slightest burning, tearing &c. will effect a revoc.n — but if the devisor should thro inadvertence, undesignedly burn obliterate &c. without intending to revoke it, could be no revoc.n — If however, he should wholly destroy the will, it would be a revoc.n let his intent.n have been what it might, because he has put an end to its existence. —

Pow. on D. 633-4. &c.
Cow. 5. 52. 1. Plms. 340.
2. Lem. 442. 3. Wils. 508.
2. Bl. Rep. 1043.
1 Eq. ca. ab. 409. Plms. 343. 4. Bac. 2513.

Tearing &c. by a stranger without test.rs direction is no revoc.n unless the will be totally destroyed. —

2 Lem. 441.

Test.r may obliterate some parts of the will, & it will be only a revoc.n pro tanto. —

Cow. 5. 512.

— Devises. —

Of Republication:—

Prov. on S. 34. 4. S. Rep. 501. 1. Ch. 103. 1 Ves. 489. B. Ch. 139. 3. Atk. 315.

The effect of a republication of a will is to make it speak from the time of the republication or to give it a new date; so that after a republication the devise will comprehend all such lands & tenements as it would have comprehended if originally made at the time of republication &c. &c.

Ro. Eliz. 493. Moore. 464. Cases Pr. 351. 9. Rot. 8. 1. Ves. 442. 1. P. Wms. 275-8. Coup. 158.

If one devises all his lands &c. & a subsequent time republishes the devise, it will comprehend intermediate acquisitions of land — So if one devises all his lands to his sons A. & B. after which A. dies & the testator has an after-born son, son he calls B. & then republishes his devise. B. the after-born son will take with A. under the devise. — But if one devises his lands in L. & having afterwards purchased lands in N. republishes the devise will not hold the lands in N.; for the words of the devise even if it had been originally made at the time of republication would not comprehend the land in N. So if in the same case but the after-born son had been called by any other name than B. he would not have taken under the devise, after republication. —

3. Atk. 1st. J.

If a man devises thus, the leases which I now hold & having purchased other leases, republishes this republication if it is he then will not comprehend the leases newly purchased, because the original will is considered as a specific devise of the leases the test[r] then had.

1. Burn. 193.

A Testator devises land to his daughter "not to be subject to any control of her hus[d]" & after her hus[d] death republished the devise, taking notice of the hus[d] death a subsequ[t] husb[d] is within the restriction.

3. Mod. 318. 1 Vent 344. T. Ray. 468. 2. Lev. 243. 2. Show. 53. 2 Lev. 105.

A devise by test[r] "to my son R." — R. dies in the life time of the test[r] leaving a son R. test[r] republishes the will. it was held by Ch. K. & contra by C. B. that the grandson could not take under the word son.

Powers. Revocation.

Pow. on P. 555. 3. Atk. 98.

A revocation may be express or implied; as if test^r in a subseq^t will revoke a former one, now if then revoke the subseq^t one, it would be an implied revocation of the first.

2. Lev. 209. 2. Show. 48. Cro. Eliz. 493. Pow. 552.

An express revocation at com. law, might have been made by parole, the very slight words if spoken animo revocandi. Nor does the Stat. Car. or that 29 Ch. expressly enact any requisites to a revocation. But the construction under the Stat. Car. has been this, that as one revocation operates as a new devise from that time, it is in fact a new devise & must have all the requisites necessary to a good devise, viz. a signing by test^r attested by witnesses &c. Whether this construction will prevail in C. is uncertain, but as it is reasonable, it is probable that it will. Pow. For notwithstanding the revocation it is still the original will that takes the prob^y. the revocation operating only as giving the will a new date, & barring terms, if that may be adm. Ld. C. Mod. 78. 1. Ves. 85.

Com. R. 381. C. Mod. 78. 1. Ves. 442. Sw. and Ad. 524. 5. I.

Pow. on Dev. 557 to 563. 1. Atk. 118. 2. Lev. 209.

It has been much questioned, whether the adding of a codicil to the will were a revocation or not. Some of the first cases seem to have turned upon the point whether the codicil were annexed to the will or not; but it seems now to be settled that it is a revocation even if not annexed, provided it in any way carries upon or refers to the will. And there seems to be no reason why it should not be a revocation if it does not in express terms refer to the will; or the very idea of a codicil implies a former will to which it is a subsequent addition, tho' it will it must refer. Tho' it may still be a question whether it can be reasonably inferred from the mere writing of a codicil that the test^r intended his will should stand as from that time.

3. Atk. 180. Com. 381. C. Mod. 78. 2. Ch. Ca. 329. 1. Ves. 43^n. 484. 493. Pow. on D. 558^n. Cowp. 158.

But a codicil in order to be a revocation must be executed according to the Stat. as to disposing of real prop. & it seems that if it be so executed it is a revocation altho' it contains only directions of personal prop^y.

Pow. on D. 557. 181. 184. Cro. Eliz. 493. 1. Rol. 618. 2. Lev. 722.

It is said that if a devise is not duly executed, the adding of a codicil attended with all the requisites of a devise does not make the original devise good. But the

Pow. on D. 270. 2. Lev. 50^n. Pow. on D. 181. 184.

1. Bur. 549. must be only in cases where the will & codicil take effect wholly as distinct instruments, & when the codicil is not considered as a part of the Will. — If the will were kept when the codicil was executed would it not be a good execn. of the will? Carth. 34. Pr. Ch. 2 V. C. Bu. on Ed. 101. Ca. H.

Pow. 652.
Ved. 31. 318.

1. Ins. 162. 1. Keb. 589. A devise made by an infant may be confirmed by re-execution after he attains full age. But if such confirmn. be b. breathe it will not be effl.

Pow. 655.
Comb. 84.
Vin. 328.

Public cs are the same in equity as at law. —

Corp. 132.

Of the Probate of a Will.

Pow. on D. 700, 708. The Probate of a Will in Eng. by the Spiritual Cts. is conclusive as to the personal, but not as to the real prop. disposed of by it. There is indeed no need of proving a devise of real prop. at all in Eng. tho it frequently is proved in Chy. but, the devisee may enter upon it immediately, & if disputes arise they may be tried in the com. law Cts.

2. Ferbl. 379.

All wills are in C. proved by the Cts. of Probate; but from their decisions an appeal lies to the Sup. Ct. The rules of proving wills &c. are the same in the Cts. in C. as in the Ecclesiastical Cts in Eng. — If the opinion of the Sup. Ct. on an appeal coincides with the decision of Probate, no further proceedings are had: if otherwise the will &c. is remitted to Probate with directions to the judge to conform to the decision above. —

Proofs.

Ff. 315.
1 Pl. 2 Ff. Stra. 1090 1095 Fox and Ro. 2 Ro. 25

The subscribing witnesses to the will must always be called when to prove it if they are living or beyond sea and any other testimony. But the oath of one of the witnesses both according to the Eng. and Prac. that he saw the testator sign the will & the other witness attested & subscribed it in the testator's presence is sufficient. The subscribing witnesses may testify to the testator's insanity but may not testify to any fact by other evidence that he was not insane.

Ff. 3 Ro. Dev. 7 Ro. 25 Ro. 15.

Ch. in bringing a devise with on all the witnesses; the will not alone a will to be proved unless all the witnesses are examined even if one is beyond sea: but in such a case the will must an issue at law of devisavit vel non.

1 Tomk. 184-5. 1 Wms. 2 D. 1 Ca. 177. 2 Ro. 2 Ro. 28. 2 Ves. 259. 1 Ath. 327

A partition made by the Ct. of Probate in Ct. among the real owners of an estate devised or descended is conclusive upon them as to the shares each one is to take unless it can be shown to be wrong on appeal to the Sup. Ct. but it is not conclusive nor has it any operation as to the title. It gives no title to any of the persons to whom it is distributed but only settles what share each is to take if he has they are entitled to it. And if any claimant is excluded by the Ct. of Probate it is not even necessary that he should appeal from the distribution of the Ct. of Probate to the Sup. Ct. but he may bring an action of ejectment immediately against those to whom it has been distributed & have a trial at law to determine whether they are entitled to it or not. Dec.

— Devises. —

1 Fonbl. 12. 53 &c. 3. Atk. 1. 2. W. 324. 324. 1. P. Wms. 548. 288. 2. W. 270. 2. Ves. 183. Pow. on D. 591. 4.

It is a general rule that Ch. will never interfere to set aside a will or devise on the ground of fraud, because such a will is void at law; & if it be a testament of personal prop. the Spiritual Ct. can set it aside. In both these cases as full justice is done & adequate relief can be had without going to Ch. for a will obtained by fraud is considered at law as no will) that Ct. will not interfere. —

Pow. on D. 595. Fob. 109. 1. P. Wms. 288. 2. Vern. 599. 700. Bro. Ch. 3. 4. —

But there are cases of fraud in which Ch. will interfere but that is where there is no redress at law. This is in those cases where the testator has imposed a confidence in the devisee, that he will perform certain acts not particularized in the will, or where the devisee by representations to the test.r has induced him to omit dispositions in the will which he intended should take place, relying the devisee promised to fulfill. — In these cases, the will is not set aside but Ch. will consider the devisee as a trustee for the person whom he has defrauded by this breach of confidence. —

Pow. on D. 170. 1. Ch. Rep. 55. Com. Dig. tit. Dev. Dyer. 43. Raym. 334.

So Ch. will relieve ag.st a will obtained by restraint not amounting at law to duress. — Or if a will be obtained by great importunity when the test.r is sick & weak it may in some cases be set aside. — See Vid. Pow. on D. 171. —

Vid. 325.

A will or devise made by a person incapable of bequeathing his prop.y is not established on removal of the disability unless it be actually republished by writing according to the Stat.; for the original writing was no devise, so that unless the republic.n have the Stat. requisites, there will have been no devise according to the Stat. — An imperfect republic.n in this case, as by removing the zeroc.n, will not make the devise good; for it was void before the zeroc.n & the removal of that will only leave it as it was before that took place. —

1. Sid. 102. T. Ray. 84. Salk. 328. Pow. 585.

Lev. 51. 3. Atk. 395.

Of feme covert's power to devise.

By Stat. 34. Hen. 8. feme covert are expr. by disabled to devise. The Stat. 32 (has given the power of devising "to all persons not legally incapable." Who, then are "legally incapable"? — Those who at com. law could not devise such prop. as was devisable. — But feme cov. at com. law could devise all pr. by of her own, over which her husb. had no power, if it was in its nature devisable as in the case of personal prop. given her for her sole use as in ecclesiae. Bacon Ab. argues that the will of a feme covert is not generally good; because it is of her husb. goods & not of her own. "Sir Edwd. Coke says expressly that feme cov. may devise her own prop." — It is objected, that the Stat. declare her capable of devising only "with her husb. consent." But this rule applies only to cases of her devising personal prop. by. belonging, by the marriage, to her husb. — She might at com. law bequeath her choses in action, for unless her husb. made them his own during coverture he had no title to them. — Since she has been allowed to hold separate prop.; she may clear dispose of it as a feme sole; except that she cannot devise it, in Eng. if it consist of lands, being expressly disabled by Stat. 32. Hen. 8. — It is objected to the inference drawn from the law respecting wifes separate prop.: that as to her prop. she is regarded as sole. — But this cannot be the reason of allowing her to devise such prop.: for if it were, she would not be allowed to devise her separate real prop. She might at com. law, bequeath before the husb. death, such pers. prop. as would accrue to her on his death; also her jewels, apparel, &c. rationabilis pars; & if she survived him, this will would be good; not so of real prop. She may also, devise a trust estate. So, if the husb. be tenant for life, she may make a will.

The 2 p. l. 315.

Glanv.
Bract. 50.

1. Rew. Hist. E. 2. 101. 111.
30 Ed. 1. 4. Ed. 73.
5. Hen. 8. 31 & 32. Hen. 8.

Co. Ca. 210. 3 Ed.
1. Rew. E. 2. 30 Ed. 1. Mod. 211.

1. Ves. 5. S. 190. 303.
2. Atk. 1. Br. Ch. 16.
3. Atk. 395. Pr. Ch. 204-5. 1. P. Wms. 126. 7 & 8. 2. Atk. 82. 315.

Hoor. 340. 1. Rol. 905. 912. Dev. on D. 95.

Plowd. 344. 1. Rew. Hist. E. 2. 30 Ed. 1. 4. Ed. 73.

2 Ves. 94.
2. Vern. 104.

From all these facts, it most evidently appears that there is, in the nature of coverture, nothing to prevent a wife

Hen. Bl. — Pow. on D. 147. 8. 9.

from devising; but that on com. law principles a feme covert may devise whatever in its nature is devisable, provided she does not infringe her husb.d marital rights. And as femes cov.t are not excepted in the stat. of 34 they must be on the same footing with resp.t to devisable prop.y as at com. law: and by stat. of 34 real prop.y is made devisable. There seems therefore to be no good reason in this state why a feme cov.t may not devise, or, as a freehold may there be made, by deed to commence in futuro alienee) her real prop.y having the husb.d curtesy.

9. Mod. 78. Pr. Ch. 320. 2. Vern. 79. 1. Ves. 137. 4 Br.

A devise of an equitable est. is good. Even when the est. rests in articles only, Ch.y will let out the devisee: for in equity, in this case, the vendor is regarded only as a trustee & Ch.y consider as done what is agreed to be done. But if the devise were made before the articles, the prop.y would not pass; for in this case, the vendee would not even in equity be fixed at the time of the devise. Such a devise has however been held in one instance for the purpose of paying debts.

2. P. Wms. 529.

Plowd. 344. L. Ray. 438. Comb. 76. 65. a 1. Br. Parn. 199.

It has been questioned whether if one devises land specifically described before he owns it, & afterwards purchases it, it will not pass by the devise? This has been differently decided.

Devises.

Flio. 310. b.

* Of Powers to devise, sell &c.

Powers given by one to another to devise, sell or dispose of his brothrs are of two kinds 1. Where there is a mere naked authority as if the lands be ordered by the testr to be sold by his exrs or if he direct his exrs to sell &c. and in these cases the heir & not the exrs has the benefit of the est till sold. 2. Where there is an authority coupled with an interest, as if it be devised to the exrs to sell &c. and in this case the exrs & not the heir, has the benefit of the est till it is sold.

Moor. 724. Co. Lit 113. 1. Rol. 330.

Where a mere naked authority is given does not lie in the exercise of it; for the authority does not inure to the exrs of such exrs unless it is so expressly provided. And if there are two or more exrs one cannot act without the other. Nor does the authority devolve to the surviving exrs as it does when exrs are invested with authority. Co. Lit. 235.

Co. Lit. 235.

But if the authority is coupled with an interest yet if three exrs are invested with a naked authority & the testator empowers "his exrs" to sell, two survivors on the death of one may act under the authority; for two answer to the description of "exrs". In all these cases the exrs are compellable by creds &c. to sell.

Co. Lit. 524. 25.

Co. Lit. 352.

If testr devises lands to be sold without naming the person by whom the sale is to be made the heir according to some authorities according to others the exrs is the proper person to execute the authority.

1. Lev. 300 or 304. 1. Atk. 420. 2. Leon. 220.

When one is entrusted with a power to hold land for the purpose of educating the testrs children till they attain the age of 21, the person empowered, will if the authority is coupled with an interest, hold till the children would have attained that age, tho' they all die in their infancy. So if one receives an authority coupled with an interest to hold lands 20 years for the purpose of paying testrs debts, he will hold the land for that period, even tho' the receiver pay the debts in one year. If the power conferred in these cases were a naked authority, the person empowered would hold the property no longer than should be necessary to answer the purpose for which the authority was given.

Devises. —

of the Devisee.

In general all persons not as by Stat. incapacitated may take under a devise.

Hob. 4. a. — Corporations are not incapacitated to take as devisees.

Hob. 4. a. — A natural child cannot take by the name, unless he be designated by his name of relation.

Pow. 310. 2. Ves. 306. 7. Co. 21. Mor. 21. Nov. 13. — Even in Eng. may take by devise tho' the office found, it can never be urged as an objection to a devise that it is an alien.

2. Vern. 105. 8. Co. 73. T. H. 1. Wilb's case. 2. Vern. 624. 5. 1 Rol. 600. Pow. on D. 418. — The devisee must be so described that there may be no uncertainty as to the person designated by the test.r. But altho' at the time of the test.r death it may be uncertain yet if by a subsequent event it becomes certain the devise may be good; as where the devise was to one of his cousins daughters who should first marry a Morton, within fifteen years, it was held that if any one did marry a Morton within 15 years in Noble's Case.

T. Ray. 82.

Pow. 315. 7. Abb. 33. 2 Eq. ca. ab. 290. 7. Pr. Ch. 40. Cro. Eliz. 570. Talb. 251. 3. Atk. 750. 761. Br. Ch. 32. 1. Ves. 335. Hob. 38 a. — A devise "to such a family" operates as a devise to the heirs of that family. A devise to one's "posterity" is good to his heirs. A devise "to the next of kin" to the testator to "his next relations" — to "his relations" — to "his poor relations", goes to such of the relations of the blood of the devisor, as would take under the Stat. of distributions. Qu. Whether a devise of lands would in such a case go according to the Stat. of distribut.n? Vide Pow. on D. 352. a. Mr. R. thinks not on the ground that that Stat. does not relate at all to lands. But in C. there would seem to be no reason why lands should not go according to the Stat. in such case, for real as well as personal, tho' it is here distributed according to the Stat.

Pow. D. 352. 355. Cro. Eliz. 531. 552. 5. 7. — If one devises to the "next of his name", his daughter who afterwards marries may take under the devise. Otherwise if she be married at the time of making the devise.

All the above cases have been determ.d on the acknowledged principle of intention & are open to observation.

Devises.

1. Atk. 410. 2. Ab. 240. 2. Ves. 217. 8. Vin. Ab. 197. 2. Eq. ca. ab. 415. 6. Pow. on D. 499.

A person sufficiently described, the wrongly named may take by devise, but not by deed: As, if a devise is made to "A the son & heir of B" the name of the son & heir being C. and in cases of this kind parole proof of testr. declar. & circumstances may be introduced to identify the devisee. But even in case of a devise if the name erroneously made use of applies to another person the devise will be void for uncertainty.—

Ch. Feb. 6th.

1. Sid. 153. 1. Lev. 135. Salk. 229. Str. 1003. Dyer. 303. Moor. 537. 1. Ch. 2. Mod. 8. Q. Ch. Ray. 83. 2. Bulst. 273. 5. 1. Rol. 304. Hob. 30. a.

It has been a question of great agitation in Eng. whether a child not in esse, but in ventre sa mere, can take by a devise made by verba in presenti it being contended that as such a child was not in rerum natura it could not take. — All agree that a devise made by words which import that the child shall take when born, is good. And Mr. R. believes that it must be the testators intention, in all cases whatever may be the words he uses for it can rarely be imagined that the testr. meant that it should take before it was born. And, in fact the rule seems now to be reduced to this, that if the Ct can find a case in which the devisor actually intended that the child should take have the disposal of the prop. instantly before born, then it will not lapse but the devise.

1. Wils. 185. 225. Salk. 145. 4. Bur. 2157.

See this whole subject in Pow. on D. from 326. to 335.

But it is easy to see that such a case will never occur, & that this language is used only to avoid overturning established precedents.—

Pow. on D. 443. b.

A devisee may waive a devise, & it will thus fail of taking effect. Such a waiver may be express or implied. An express waiver is an actual renunciation. It may be made by parole testimy. An implied waiver is one inferred from some act of the devisee: ex. gr. Where devisees have conveyed to a stranger the lands the devise is for A. actually devises them to B. but bequeaths other prop. to A. — A has accepted the latter & gives his claim to the former. Twice were A. may in this case compel performce. of the intention of the devisor.—

1. Ves. 238. Tell. 1. 5. 2. Vern. 381. 232. 3. 555. 2. Ves. 14. 617. 1. Atk. 426. Hob. 330.

The rule which regulates the admission of parole testimony to explain any ambiguity or remove any uncertainty in a will is this: If the ambiguity or uncertainty is patent i.e. plain & apparent on the face of the will itself, parole proof can not be admitted to explain it, but the devise must wholly fail of taking effect as if the devise were to the best man in C. or the one of the sons of A. B. die has proved. But if the uncertainty is latent i.e. created by circumstances extrinsic to, & not from the will itself being intelligible enough, parole proof may be admitted, as if a man having two sons of the name of John, & devise land to his "son John" parole proof may be admitted to shew which one of that name he meant.

Pow. on D. 400.

Pow. 418. 424. 5. Burr. 671.

2 Vern. 524. 6. 98.

5. Co. Rep. 58. 1. Ves. 231. 2. P. Wm. 137. 1. Ab. 674.

So, in certain cases parole declarations & memorials of the test. may be admitted to explain the will, tho the general rule is that they cannot be proved to ~~shew~~ alter or vary the natural import of the will. They may be admitted,

Pow. on D. 477. 8. 2. P. Wm. 315. Plowd. 345. 2. Vern. 98.

1. Where the test. makes use of words of an equivocal import, bearing different meanings, & construed differently at different times as is the case with the word "estate", Cts. will let in proof of extrinsic circumstances or of declar.s by the test. to shew how the word is to be construed. — As, formerly, if the devise were to one, & the test.s "estate" upon his paying the debts &c. parole proof would be admitted to shew whether the test.s personal property were suff. to pay his debts, because if it were, devisee would take only an est. for life, otherwise a fee. — But now it is settled that the word estate, ex vi termini, conveys a fee-simple if the test. had it, or at least all the interest he had. —

Moore. 105. 1. P. Wms. 674. Pow. on D. 502. 503. 518. 3. Keb. 49.

5. Burr. 1. 13. 558. 3. Bur. 1541. 1533. 6. Rep. 16. Pre. Ch. 71. 1. Fonbl. 440. 1. Atk. 414.

1. Burr. 412. 2. Ab. 657. 4. Ab. 93. 5. Ab. 562.

2. Where the words on the face of the will are not of equivocal import but such as have a definite, legal meaning, yet parole testim.y relative to the circumstances, situation & value of the prop.y devised may be admitted to explain the test.s intention as to what estate, should pass in them. As where the test. among other things gave "to J. B. the house called the Bell-tavern" which words are not in the least equivocal, but according to the construction uniformly adopted, would pass only an est. for life. Parole proof was

Pow. 2. 506. 518. 2. Eq. ca. abr. 298. Bur. 1898. Pre. Ch. 71.

Salk. 234. 2. Ray. 821 or 831. 1. Ab. Par. ca. 108.

admitted to shew that Ch. B. the devisee was tenant in tail of the Bell tavern & that the testator had only the reversion in fee, so that it must have been his intention by those words to give an est. in fee to Ch. B. & the Ct. decided that he took an est. in fee. — But the case which has carried this principle the farthest is that of Tonere & Payntz, in which, altho' the words of the will were clearly intelligible & have a fixed & certain meaning, yet parol proof of the state of the devisor's prop. was admitted to create an ambiguity, to shew that the words were not probably used by the testator in their ordinary meaning, & that if this were to be so taken, great part of the testator's will which was obviously meant to have effect, would fail. From this case it may be inferred that the Ct. will always admit parole proof to cast light upon the will, & enable the Ct. to give it such a construction as will square with the state of the testator's prop. —

1. Br. Ch. 42.

Pow. on D. 519–20.

3. Where the meaning of the will, upon the face of it is clear & determinate, yet its operation may be effected & varied by parole proof of the situation of the testator's or devisees family. — If a devise is made "to A. for life & after his death to his children" if he has no children at the time of the devise, the term "children" is a word of limitation, & A. & his issue take an est. tail; the words "for life" signifying nothing. So, if "issue" were used instead of "children". — But if A. had children at the time of the devise, he would take an est. for life, remainder to them for life, unless an intention to give the children a fee, should appear; the word "children" being in this last case considered as descriptio personarum. — So if an est. is devised "to A. and his children", he having children at the time, he & they would take together as joint-tenants for life. But if he had no children at the time, the devise would convey an est. tail. — As therefore, these words receive different constructions, in cases different circumstances, parole proof of the circumstances of the devisee as to his at the time of the devise is admitted to explain the uncertainty

1. Atk. 411. 2. Plums. 135. 5. Reb. 18. Pow. 2. 504. 518.

Ind. (as 21.) Goodeave

Devises. –

2. Vern. 505. Pow. D. 536. –

4. Parole evidence will be admitted in construing a will, in all cases to counteract fraud. – but in this case Sub pœna it may be admitted, contrary to the next rule, even tho' it does not "stand well with the will."

Pow. D. 524 &c. 3. Atk. 495. 2. Eq. ca. ab. 215.

But it is a rule that parole testim. cannot be admitted to prove any fact that does not "stand well with the will." as where the devise was "to the children of A." the Ct. would not admit parole proof to shew that the test. meant a part of the children only. So where the test. made his two exs. residuary legatees of his est. none of them owed him any

2. Ves. 215.

Talb. 240. 2. Stra. 1201. –

bond £3000 it was offered to be proved that the test. meant that this £3000 should be given in to the exs. who owed it & that they should share the remainder equally, but the Chancellor would not admit it, & decreed the exs. to have one half of the £3000. —

2. Atk. 240.

So a blank in a will cannot be filled up by the Ct. upon the strength of parole testim. this is a clear point concerning

Pow. D. 524 &c.

Parole testim. is also adm. like to resort an equity. –

2. Vern. 252. 3. 677. 2. L. Ray. 1324. Talb. 79. 2. Eq. ca. ab. 506. 1.

But this is meant thus in those cases where the construction put upon certain words in a will is different in a Ct. of Ch. from that offered to the same in a Ct. of law, parole proof of the declaration of the test. is admissible to shew that he meant they should go according to the legal construction. – Thus at law the ex. is entitled to the surplus of the est. after paym. of debts & legacies, but in Ch. he is considered as trustee of it for the next of kin – parole proof may be admitted to shew that the test. intended & declared that he should have it according to the legal construction –

Devises.

Pow. D. 529.
1. Ven. 323 or 223.
Id. 332 b.

Parole testim.y may also be admitted to shew, that a devise in a will was intended by the testator in satisfaction of a settlement or other provision, which he was, by articles or in other way bound to make. - This may throw some light on the question in this State, whether a wife shall take dower & a third of the test.rs estate under a will, when it is not expressed to be in bar of dower.

Fitz. 277 b.

2. Bl. Com. 241.

A devise to one, of that which he would have taken by descent, is void, provided the devisee is of an estate no greater nor less than he would have inherited: & in this case he shall be taken to be in by descent, not in devise.

Co. Lit. 853 or 833.
2. Bur. 880. 1. Bl. Rep. 22.

This rule is of importance in Eng.: For, if an heir should take by devise instead of descent, what he would have inherited, the est. being obtained by purchase, would become devised as a feud of indefinite antiquity, & such would go first to his paternal & then to his maternal heirs: whereas, if he were in by descent the est. would go, on his death, to those only of the heirs who are descended from that line of ancestors from which the est. came. - In C. the rule is of no importance: for an estate derived by devise from an ancestor will be inheritable in the same manner as if it had descended. Heirs of gavelkind lands may take by devise, what they would have taken by descent: Because by descent they would take as coparceners by devise as joint-tenants.

Devises. —

Vide 272.a.b.

A devise giving an est. contrary to the rules of law is void: as, if one make a devise of personal prop.y to A. & the heirs of his body this is void as to the heirs for an entailm.t cannot be created in personal prop.y So, a devise of a fee simple not alienable.

2. Bl. Com. 242.
Pow. on C. 41.

A devise to "A. for life & to his heirs forever," gives A. a fee-simple: for the word heirs not being descriptio personae the heirs of A. cannot take as purchasers, but, if at all as heirs i.e. by descent from A. — If however it can be collected from the will that the test.r used the term "heirs" not in its legal technical sense, but as it is used in common parlance to describe some particular person, to the heirs of B. who is now living, it will be taken as descriptio personae, & the test.rs intention carried into effect, accordingly. —

Vide 273.a.

II. Of Purchase by Executors.

3. Rep. 11. 12. Co. Lit. 304.

At Com. Law no title to the fee of lands could be acquired by the Exec. on exn. — the most that could be done was to have a extended or a thrave assigned to the creditor for a certain length of time until out of the rents & profits he had satisfied the debt. — Lands in the hands of an heir were liable for the debts of the ancestor, in the same way as would not be taken & sold, unless assigned in fee to the creditors as has been shown.

Plowd. 439.

3. Rep. 12. 3. Bl. Com. 444.

The common exn was twofold, fieri facias & levari facias, the former is also mentioned — the first was used in case of money civil as for debt; the last for debts had recovered damages and to that. Bl. & S. the exn. was extended to cases of debts other than debts the same there the writs exn were in the shape of the crdt. having recovered damages. —

3. Bl. Com. 31 & 3. Co. 11.

1. The fi. fa. goes agt. a man's goods & the profits of his lands, such as emblements, even timber trees &c. — On this exn the goods are sold but the profits of the land must be taken to the crdt. himself in satisfaction — So rents might be taken by this exn — for the tenant at whom the lands of the debtor in the hands of a tenant & giving notice of such fact to the lessor & notice the latter becomes bound to pay the rents to the crdt. If after such notice he pays to the lessor he does it in his own wrong, & may be compelled to pay over again to the crdt. —

3. Bl. Com. 41.

The fi. fa. goes agt. the goods & chattels of the debtor, such as he be sold & the money arising from the sale to be paid to the crdt. It has also been decided that emblements may be taken in this exn & sold, but other profits of land as grass &c. cannot be taken on a fi. fa. — Chattels real are taken on a fi. fa. and be either sold or extended. They may also be extended not only to the creditor but to any person who will discharge the debt. —

1. Salk 368.

8. Rep 171.

3. Bl. 414. 3. Co. 11. 12. 3. Inst. 54. This is a writ of exon. agt. the body only. It was originally used only in cases of replevin vi et armis, but by a variety of Stats. has been made as extensive as any other exon.

3. Bl. C. 418. An elegit is an exon by Stat. Westm. 2. It goes agt. the goods, chattels & half of the lands of the debtor, which are to be extended to the cred. & not taken in fee. The goods & chattels are not to be sold, but appraised & off to the cred.

3. Bl. C. 421. 1. Rol. 892. Co. Eliz. 174. Moor 878. At com. law, lands were bound from the first day of the term in which judgm. was recovered, & personal property from the date of the exon. But now by the Stat. Frauds, the judgt. shall not bind the lands in the hands of a bona fide purchaser, but only from the day of actually issuing the same. Nor does the exon bind the goods in the hands of a stranger or purchaser, but only from the actual delivery of the writ to the officer.

The Stat. of C. renders the fee of the debtor's land liable to be transferred by exon.; but it extends to no other than simple lands. It issues agt. the goods, lands & body of the debtor. As the Stat. of C. on this subject affects only fee-simple lands, other landed property must remain liable as at com. law.

2. Sa. 55. But no lands can be taken as long as there is personal prop. to be attained. When there is made out to the cred. that it is his option to take the lands or the body of the debtor.

Exts. taking exts. for life, not being comprehended in the Stat. the practice in C. Pleas not directly sanctioned by the Ct. has been to follow the course of neither the fa. fa. nor of the elegit; but to extend the whole instead of half of ppl. property for a certain number of years. One of the exts. of the debtor terminates before the period expires for which the prop. is extended, a fieri facias is taken out agt. his exr. to secure the balance remaining.

1. Sw. 334. cor.

Executions. –

Terms for years are taken in C. as on a fi. fa. & sold or extended. – Emblements have been treated in a manner wholly different from the Eng. law. It has been customary to levy on them while growing, at any time of year. Having secured the prop.y by levying, the officer reaps or gathers it in the proper season, & having thus reduced it to mere personal prop.y he sells it at the Post. As to the legality of levying on grass in this manner there has been some doubt. Mr R. however, holds that grass may as well be taken in this manner, as emblements. A fi. fa. also is to be the proper remedy in this case.

The Stat. of C. has made no provision for taking a reversion in exon. the proper remedy seems to be by fi. fa. by levying which the reversioner's claim to rent may be transferred to the creditor. –

It has been decided in C. by a divided Ct. that money may be levied upon by an exon. Mr R. questions the propriety of such a decision.

A sale at auction by a sheriff of prop.y taken on an exon vests the prop.y in the purchaser even tho the goods did not belong to the person for whose debt they were taken. The case is the same if the judg.t on which they are taken is reverse

5. Co. Rep. 9. Cro. Jac. 245.
Yelv. 180.

Of Purchase by Deed. —

The tenants of lands during the early periods of the feudal system in Eng. had no power to alienate without the consent of the Barons — And the first grants by the barons themselves, who had a power of alienation, were for life only. Hence an est. granted to one, in general terms, not specifying the quantity of interest, is a life-estate.

Vide 2 Bl. Com. 287 q. v. Co. Lit. 91. By a variety of Stats. in Eng. which have gradually extended the power of alienation, the law is now fixed, so that all persons, in general, may alienate, if in possession; but not otherwise — Co. Lit. 390. 1 Sw. 300. For the real owner out of possession may sell to him in possession; for such alien.ⁿ is not like others where the grantor is out of poss.ⁿ considered as the sale of a quarrel, but rather as the settlement of one. — With this exception to the rule, a sale of lands by one out of poss.ⁿ, is a crime at com.ⁿ law, by the Stat. of C. as also by the Stat. Hen. 8th — Plowd. 88. According to the Stat. of C. the alienation of land by one out of possⁿ is void, & the grantor forfeits one half of the value of the land. At com. law in such case, the grantor was liable to a fine. — Vide a reversion title means one that is disturbed. Co. Lit. 306. —

Of reversions & remainders no possⁿ is necessary. —

4 Wd. 313. a. 310. a. 1 P. Wms. 574. 1 Str. 132. 1 Vis. L. 5. 409. 411. Cro. Jac. 593. 8 Vin. 112. 1 Tonbl. 201. 3. 8. q. — vid. 1 Atk. 33. 3 Burr. Contingent remainders may be devised. But it appears to be not settled whether a contingency is alienable by deed. Contingencies clothed with an interest descend, not necessarily to him who is heir at the time of the purchaser's death, but to the person who is heir at the time of the contingency happening —

— Lects. —

Persons guilty of treason or felony cannot alienate from the time of the offence if attainder follows — no such law in C. —

For the law restricting alienn. in mortmain see 2 Bl. Com. 258. & Stat. of mortmain in C. B. there is a law which prohibits the alienn. of lands given to corporations for the purpose of religious or the pious — monastic schools &c. — This stat. has been evaded, in direct violation of the Brit. it has been long usual for a term in ors. & this evasion has been sanctioned by the Cts. —

2 Bl. Com. 290. n. Lacks, lunatics &c. cannot alienate for the same reason, that they cannot make other contracts. —

Feme covert cannot alienate except by a judicial conveyance & fine levied by a feme covt. may be defeated by her survivg. but it will bind her & her representatives —

1 Id. 34. 1 Pow. on Co. 32 a. 3 Bac. 1 Ed. 94. Infants cannot alienate. All alienn. by an infant except a settlement are void. These by reason of their formality are only voidable. Purchases by an infant are voidable —

Co. Lit. 8. 7 Co. 18. 17 Salk. 45. 4 Term. 3 Co. 1. Ewns. 322. Bac. Abr. 101. Co. Lit. 132. Q. Amb. 9. An alien as he cannot hold real prop. cannot have any to alienate — For the general subject of alienage see auth. —

A consideration is necessary to a deed — and if one is acknowledged in the deed the grantor & his representatives are estopped to deny the existence of it. This be so they may always inherit its validity. A subsequent bona fide purchaser may deny the existence of a consideration acknowledged by his grantor in a former conveyance of the same prop. but the grantor & representatives as such cannot. —

Even there is no consideration expressed in the deed the prop. is still demisable to show that there actually was one

F. Vin. 126.

If there is no consider.n expressed in the deed & there actually is none, if the deed is given to a relation of the grantors it is said a good consid.n will be presumed (qu.) but if it is to a stranger there is no such presumption. In this last case therefore, the grant is said to enure to the benefit of the grantor. This was established in Eng. while the law of uses existed; but still the legal title vested in the grantee, tho' the use which was the only valuable pro.ty remained in the grantor. As the Stat. of uses has in Eng. vested the legal est. in the cestui que use such a grant cannot now be of any effect: but in C. where the doctrine of uses never prevailed, & where there is no Stat. similar to the Eng. Stat. of uses, there seems to be no reason why the pro.ty will not follow the legal title, & the grantee take in such case.

2. Bl. C. 295.

Collins v Blantern. 2. Wils. 324. 341.

Parole testimony is always admissible to shew the illegality of the consider.n of a deed, where it does not appear upon the face of the deed. If it does appear there, the instrum.t is totally void & conveys no title.

7. Co. 40. Beaver's case.

The quantum of consider.n expressed in the deed, is only prima facie evidence of the sum actually received. Parole testim.y may be adduced to shew the true sum.

If there is a consider.n expressed in the deed when there was none, the deed is still good ag.st the grantor tho' it may be void ag.st his creditors or subseq.t purchasers as being fraudulent. This leads to the consideration of Fraudulent Conveyances.

1. Fonb. Eq. 260 - 4. Kent.

Fraudulent Conveyances or those void ag.st creditors may be of three kinds. 1. When one for the purpose of defrauding his creditors conveys his pro.ty to some one from whom he does not owe, upon a secret trust either to convey it back to the grantor at some future time, or to suffer him to enjoy the rents & profits or use of it. 2. Where, with the same view, the grantor conveys pro.ty to a creditor of much greater value than the amount of his debt, upon a similar secret trust that the excess after paym.t of his debt shall in some way result to the grantor's benefit. In this case, altho' the grantee is a real creditor yet the whole conveyance is void & he cannot retain ag.st another creditor any part of the pro.ty thus conveyed

a claim of damages for a tort does not constitute a creditor. Pr. Ch. 105.

to satisfy his own debt; for as he is assisting the grantor to defraud his other creds. the law will shew him no favour. – 3. A voluntary conveyance, made upon a good consider.ⁿ only, tho' not done to defraud creditors may be void as to them, for a man must be just before he is bountiful. –

The law with regard to the two first kinds, which are those strictly fraudulent is nearly similar. – In both of them the conveyance is void, agᵗ. the grantor & has no presentation void only as to creditors or bona fide purchasers – in neither of them can the grantor compel the grantee to execute a secret trust between them by conveying the prop.ᵗ back; & indeed it may be a question how the Stat. of Frauds & Perjuries whether any mere parole trust relative to lands, can be enforced even when there is no fraud in the case. –

Cro. Jac. 270. 1 Vern. 132. 100. 464. 2 Ab. 475.

A conveyance may be fraudulent, when made to a creditor even tho' it be of bⁿ & of no greater value than his debt but this is only where there is some evidence that the conveyance was not actually in satisfaction of the debt, but made up the secret iniquitous trust above-mentioned. So, if land is sold to one for its full value yet if be done with a view to convert the money thus to escape ⁱᵗ avoid creditors, & the grantee assistⁿ in this design, it may be questioned whether this would not be fraudulent & void.

3 Co. 82.

Cowp. 54.

If a debtor should convey away a favorite piece of land to keep it from creditors having a sufficiency of other prop.ᵗ to satisfy their debts this would not be fraudulent –

Those conveyances which are strictly fraudulent & the 2nd kind are void not only agᵗ. creditors antecedent, but also agᵗ those subsequent to the conveyⁿ. – but a creditor who became so subseq.ᵗ to a voluntary conveyⁿ can have no claim agᵗ. the grantee, for he could not have trusted the grantor on the strength of this prop.ᵗ. – Besides in this case, as the grantee is in poss.ⁿ by a fair title, the maxim will apply qui prior est in tempore potior est in jure – where the conveyance is really fraudulent this maxim will not apply, because the grantee has no title but a dishonest one. –

2 Vic. 11.

With regard to a bona fide purchaser subsequent to

Cowp. 705 clearly proves that a voluntary conveyance is by no means ipso facto fraudulent.

a volunt.y convey.ce the law may be diff.t: for the act of selling it again by the grantor after such a convey.ce carries presum. strong evidence that the first sale was fraudul.t or made in ter. some trust for if this were not the case why should he attempt to sell that again which he had once before sold & to which he could have no claim? — The Stat. 27. Eliz. has provided that such subsequ.t purchaser shall hold in preference to the volunt.y grantee if he had no notice of such previous sale — And if such previous sale were a fraudulent one, he will hold even tho' he had notice —

2 Wils. 357. 1 Fonbl. 268-9. 5. Co. 60. 1 Ro. 133. 4 Lev. 388. 1 Vern. 46. Cowp. 711. 280. Ch. Ca. 68. 2 P. Wms. 354. 2 Wils. 350. Powell. 296. 315. 366.

Cowb. 434. 1 Fonbl. 267.

(Note. It is said by Mr Mais that the Stat. 27. Eliz. & all the Eng. Stats on this subject are only in affirmance of the com. law & therefore, decis.ns upon them may be landing law.)

In C. a purchaser, by resorting to the public records may always have notice of a prior conveyance: it may therefore be a question, whether a volunt.y convey.ce could ever be defeated by a subsequ.t purchaser.

If a debtor at the time of making a volunt.y convey.ce were possessed of prop.y amply sufficient to satisfy all his debts, but should afterwards become unable to pay them, his cred.rs in the mean time lying by & seeing him squander his prop.y it is doubtful whether they could defeat this convey.ce altho' their debts were antecedent to it.

Cowb. 432. 765. Vid. 90.

If after a fraudul.t convey.ce the grantee shou. convey to a bona fide purchaser, still the cred.rs of the grantor might take it out of his hands. otherwise the whole law might be in every case defeated. —

Of the Requisites to a Deed.

Any writing which is sealed & delivered, tho' it refer to personally is a deed.

2 Bl. Com. 296. & Co. Lit. 35. 229. A deed to convey real prop.y must be written, in Eng. on paper or parchment. The other requisites are reading, if desired, or if any of the parties are illiterate & unable to read it themselves — delivery — attestation — & in C. recording.

4. Burr. 165. A mere clerical mistake in writing a deed, either in description, or in any other particular, will not prevent a deed from operating according to the intent of the parties. Such a mistake may always be explained.

A description of land conveyed by deed, may be either 1. by metes & bounds. 2. by lines extending certain distances in certain directions. or 3. by a statement of the number of acres. When two or all of these modes of description are used, the first, in case of inconsistency, governs, to the exclusion of the latter. & the 2d. supersedes the third.

If lands conveyed are described by metes & bounds, no action lies on the cov.t of warranty, even tho' the number of acres are fewer than were mentioned in the deed. But if the grantor deceived the grantee in this case, as to the quantity, the latter may have an action of fraud.

1 Sw. 305. The law is the same if the description is by lines. The grantor, however, is liable on the cov.t of warranty if the lines or metes described, are variant from the true lines, but if on the quantity of acres contained within the lines is less than was mentioned in the deed an action of fraud will lie.

But where the only description, as to quantity, is by a mention of the number of acres, an action on the warr. lies in case of deficiency.

If grantor conveys thus "My farm of land, lying next A's containing 100 acres," he is liable on his cov.t of warran. in case of deficiency, & yet, if there be more than 100 acres the grantee will hold the whole.

If one sells a specific piece of land containing a certain number of acres "more or less," the words "more or less" are considered as words of estimation: and, in this case, the grantee has no action of warranty, in case of deficiency. (Qu. May he not have an action of fraud, if he has been intentionally deceived?) If in this case the words "more or less" had been omitted an action would lie on the warranty.—

If a grantor reserves on sale of land an annual sum in nature of rent, the reservation is of real property & goes to his heirs. Otherwise if the reservn. be of a sum in arrears.—

Of the delivery of a deed.— The delivery of a deed must be proved. If the witnesses are dead, their attestation is presumptive evidence of delivery. Presumption of a delivery arises also from a peaceable possession of the deed, or of the land by the grantee.— In Co. Lit. 36 it says that the delivery is made before witnesses. But the acknowledgment before a justice, is very strong presumptive evidence of a delivery. The Eng. acknowledgmt is not required.—

1. Pur. 313. A deed executed by one, on behalf of himself & another in the presence & by the authority of the latter will bind both.

Co. Lit. 35. An act without words may be a good delivery & vice versa.

A deed which is delivered upon some condition is called an escrow— and does not become the act & deed of the grantor till the condition is fulfilled, or the event happens upon which it is delivered; but after that it relates back to the first delivery.—

9. Co. 137. Co. Lit. 36. Cro. Eliz. 520. 884. Moo. 245. It seems to be settled by the current of authorities that a deed cannot be delivered as an escrow to the grantee himself. It has been so decided in Co. by the Sup. Ct.— Several author-

Dyer 34. Moor 697. Cro. Eliz. 835.

ities however, maintain a different doctrine - and Mr. R. supposes that where, on delivery, the grantee is to do some concurrent act, as delivering his obligⁿ &c.; the mere tradition of the deed should not be considered as a legal delivery, unless such concurrent act be performed: for the omission of such concurrent act is forever in the power of the grantee. Where the deed is to be defeated upon some future contingency there seems to be no reason why it should be delivered to the grantee as an escrow; for it may, in such case, always be delivered to a third person -

2 Rol. 25.

When a deed is delivered to a third person as an escrow if the grantee by any means gets possession of it before the happening of the event upon which it was to become his act & deed, parole proof may be admitted to defeat grantee's title.

2. Rol. 25. 3. Bur. 1805. Cro. Eliz. 44. 3 Rep. 35. Co. Lit. 38.

If a person generally incapable of making a deed, as a feme covert, actually makes & delivers one, after the removal of her incapacity, redelivers it - the redelivery is good & effectual - otherwise if in the first instance the delivery of it was an escrow because then the affirmance of it relates back to the time of the first delivery when she was incapable of making a valid deed.

This rule is reversed in Co. Lit. its bounds, when the inability to convey in the first instance is not general nor necessarily connected with the character of the grantor but merely accidental - as if a disseisee convey land, & after he has acquired the seisin redelivers the deed. It is said as to a operation, necessary to the last delivery. But if it had been delivered as an escrow in the first instance, it would be good. As to the reason of these distinctions -

Of Exceptions in a deed. A grantor may except any thing from a conveyance, which does not go to defeat the grant or any part of it as a building, timber trees &c. But an exception which is repugnant to the grant is void as if in a grant of land the grantor excepts all that he receives his descent when in fact there was no other. So the exception of a thing certain from a thing certain is void, or, as the rule is sometimes laid down, if the grantor grants away the land by an appropriate term, & then excepts by an inappropriate term, the except.n is void. as, if a grant be made of 12 acres excepting one, or of a house & then except the stable —

2. Rol. 454. Co. Lit. 47. 4 Co. 170.

It has been questioned whether if a house be reserved the fee of the land on which it stands is retained by the exception. It has been decided in C. that the right in reserv. to the land continues no longer than the building lasts. The exception of timber-trees, it would seem, would run be them personal prop.y tho' this has not been decided. It is clear that timber trees when felled by the lessor on the land they stand, become pers.l prop.y.

A deed must be read if any of the parties not incapable of reading, desire it. If it be wrongly read it is void as to that party he is not bound by it. This, as well at law as in equity, for it is a fraud in the execution. If it is read wrong by collusion, on purpose to make it void, it shall bind the fraudulent party.

2. Bl. Com. 304. 1. Sw. 306. 2. Rol. 28. 2. Co. Rep. 3. 4. Q. 11. H. 2. 8.

A date to a deed tho' usual, is not necessary; for it is only prima facie evidence of the actual time of delivery of the deed. Parole proof is admissible to show a different time.

Yelv. 193. Co. Lit. 5. 2. Co. 5. 2. Rol. 21.

Deeds.

Co. Lit. 6. 231.
2 Rol. 22. 5 Co. 23
2. Lev 220.
Ved. 251. a.

Sealing is absolutely necessary to a deed in Eng. so much so, that if the seal be broken off it destroys the validity of the deed, in one case, where it was gnawed off by the mouse it was held to be entirely invalidated. – In C. a seal is not necessary, it not being among the requisites of the Stat. tho' it is usual to affix one. –

2. Bl. Com. 307. 1 Sw. 305.
Ved. 250.
St. of Ch. II.

In Eng. witnesses are not necessary to a deed – in C. two competent witnesses are required by Stat. & this deed appears to be as void without them as a bowie. –

It has been questioned whether a grantor can himself take advantage of the want of witnesses to a deed. – That third persons can avail themselves of such a defect is certain: but Mr R. supposes that the grantor cannot; for, such a deed be considered only as evidence of an agreement to convey it is so far binding on the party making it, that he is compellable in Ch. to make a good & effectual conveyance. – (Sed quære. For in those cases in which parties & not third persons are established to impeach a deed they have generally practised fraud in making the deed, or have transgressed some law, & are therefore not entitled to the aid of the In these cases also, the formalities required in making the deed have always perhaps been observed, when the party is established, as, in the case of a deed not recorded, which binds the grantor but does not bind third persons, on the ground of their not having notice – Mr R. himself supposes that a purchaser might avail himself of this omission of witnesses, even tho' he had notice of the former conveyance but what greater equity would such a purchaser have than the grantor himself?). –

It has likewise been a question seems not to be settled whether, if the deed has not two witnesses, the grantee may not sue on the covenants contained in it? There seems to be no good reason (Mr R.) why he cannot. 2ly. Ought not a deed, on the cov.ts of which an action may be maintained, to be good as a deed in analogy to the rule of law in case of a disposing & revoking will? –

Acknowledgment before a justice & recording by the town-clerk are necessary to make out a complete conveyance in C. tho' the title completely passes out of the grantor & vests in the grantee before recording that is made necessary for the security of after purchasers &c. — Copies of the records are admitted in evidence perhaps in all cases for a subsequ.t grantee to make out the title of a prior one. —

Tho. 249.a.

Deeds lodged for recording in C. must be on file & kept that they may be seen by those who would examine the records. And if the Town Clerk neglects so to keep them open to inspection, he may be made liable to an action by a subsequent purchaser. —

Willets v. Hutchinson Sup.t C. Litch.d County.

The town-clerk can never legally redeliver even to the grantee or grantor if they both request it a deed once lodged for recording, before he has actually recorded it. for if he might the creditors of the grantee having attached the prop.y conveyed in the deed might by collusion be defeated of their lien. — Tho' if his directions were to keep it without recording till further instructions he might so do but then he must keep it open to inspection. —

Tho. 250

The deed first recorded will hold to the exclusion of a prior deed if the elder grantee has been at all negligent; otherwise, if he has used due diligence — If a second purchaser knows of a prior deed not recorded he shall not hold ag.t the first grantee even tho his deed is first recorded. Qu. if the subsequ.t grantee takes his deed as a satisfaction or security for an antecedent debt? This was decided at Litchfield to make no difference. —

Tho. 251.a.

2. Bl. Com. 308. 11. Co. 27. 1. Sa. 310. 2. Ve. 230. 2. Lev. 35. Cro. Eliz. 53.

Erasure or interlineation even in an immaterial part of the deed by the grantee renders it void. — The effect is the same if made in a material part by a stranger. — An alter.n by the obligor himself will in no case avoid it, unless there is a total destruction or obliteration of the deed; because it would be giving him advantage of his own wrong. — An alter.n by consent of both parties does not avoid the deed. —

Comb. 2. Dunf. 323.

Deeds.

2. Pow. on C. 143. 1031. Deeds may be avoided in Ch. on the ground of fraud imposition & restraint not amounting to legal duress & accident &c. & this either in whole or in part as equity may require

For the different kinds of ~~deeds~~ conveyances of real prop. under the Eng. law see 2 Bl. Com. chap. 20. Those most commonly in use at the present day are by lease & release & by bargain & sale; the latter of which the deed must be enrolled or recorded within 6 months —

2. Bl. Com. 339. A conveyance by lease & release is effected thus — the grantor leases the land about to be conveyed, to the grantee who thus by construction of law is in possession — being thus in possn. the grantor releases to him the freehold & reversion, & he thus acquires a compleat title — A release might always be made at com. law, of the freehold to any tenant having as great an int. as an est. for yrs & perhaps to a tenant at will; but it was necessary that the tent be in possn. to be capable of receiving a release In C. a release may be made to one not in possn. —

Of Uses and Trusts.

2. Bl. Com. 327. A use at com. law, was where lands were granted to one for the use of another — In this case the grantee possessed the legal title to the land but the cestui que use had in equity a right to the rents & profits, & all the beneficial interest in the land — The interests both of the grantee & of the cestui que use descended to their respective heirs on the death of each respectively, & the use was adjudged to be devisable, it being the only kind of real prop. tb. possessed that quality — But it was not liable to dower or curtesy, or to be taken on extent or exon, or to forfeiture for treason or felony — The grantee might alienate his title, &

2. Bl. 80.

4. Co. 1.

if it was to an alienee without notice of the use he took it discharged thereof. The est. of the grantee was also liable to dower & curtesy, altho' in dower or curtesy took it discharged of the use: as did the lord upon forfeiture. The Stat. of Uses (2d. Hen. 8.) had an end to these uses by executing the use in the cestui que use being made by that Stat. the ~~legal~~ owner in all cases as well of the legal est. as of the use. — But from the technical construction of the Statute which in the construction of this Stat. held that it did not extend to uses limited on uses, as where an est. is given to A. for the use of B. in trust to C. & to terms for years as if a term for 100 years be given to A. for the use of B. nor to lands given to one in trust to receive & pay over the profits to another, has arisen the doctrine of trusts, another name for uses & a creature of Ch.y. & limitations in either of these three ways being held not to be within the Stat. & the Cts. of law refusing to enforce these trusts as they always had all uses) resort was necessarily had to Ch.y. where relief was afforded by enforcing them whenever they were created in either of those three ways. — And in this manner the old doctrine of uses is revived virtually in Ch.y. only they must be made in one of those three methods which take them completely out of the Stat. —

2. Bl. Com. 335-6.

There trusts, however, as enforced in Ch.y. are free in a great measure especially since the Stat. of frauds from the mischiefs which were connected with the old doctrine of uses: they are made liable in Ch.y. for the debts of the cestui que trust — are equitable assets are alienable — devisable, as real not as pers.l prop.y — are liable to curtesy, tho' not to dower, nor to escheat, in one particular answer all the valuable purposes of legal ests. — the trustee being deprived of those unreasonable advantages which the feoffee to uses formerly possessed.

+ 2. P. Wms. 540.

The cestui que trust may in Ch.y. compel the trustee to convey to him the legal est. unless it appears that such conveyance would be contrary to the intention of the person who created the trust or unless it would be hazardous to give the cestui que trust the rights annexed to the legal est. — The existence of this hazard

is indeed considered as evidence of the intention of the maker of the est. so that a cestui que trust has not vested right to compel a conveyance of the legal est to himself —

Of Injuries to Real Property. &c

1st Of Waste.

2. Bl. C. 281. & 3. Ib. 227. This injury can be committed only by tenant for life, or years. It is a kind of substitute for trespass which cannot be committed by tenant in possession. — At com. Law it could be committed only by a ten.t for life, who acquired his title by operation of law such was ten.t in dower, & curtesy, & was deem'd in otherwise. But by Stat. Mar. Bridge 52. Hen. 3. & Glouc. c. 1. 6. Edw. 1st this action was extended to all ten.ts for life or years.

Cro. Eliz. 777. Hf. A tenant at will cannot commit waste, what would be waste in a ten.t for life or years is no trespass in him. — The assignee

5. Co. 13. 2. Lev. 84. Cro. Eliz. 683. of a base is liable for waste.

The objects of waste are, houses, lands or woods, & it is either voluntary or permissive — the former, where it is effected by some positive act of the ten.t; the latter is where it is occasioned merely by a nonfeasance or negligence —

2. Bl. Com. 281.

Co. Lit. 53. 2. Rol. 815. 818. 4. Rep. 63. a. Moor 89. The suffering of buildings, fences &c. to go to decay is waste in the tenant; for he is, at com. law, bound, of course, to repair injuries that happen in his own time. He may however, be by express provision exempted. The lessee, may, unless expressly prohibited, take timber-trees to make repairs. But the want of timber on the land is no defence for him in having neglected to repair, unless the timber has been taken away by the reversioner since the commencement of the ten.t estate. For it is the ten.t own fault to take an est. in land which has no timber. —

Bad husbandry merely, as such, is not waste; but the following acts in addition to the neglecting to repair have been considered, viz. Converting one kind of land into another

Lob. 29. with the exception of converting pasture into arable land; no kind of conversion, unless it were actually injurious, would probably be deemed waste in (c.) — Taking away what does not belong to the ten.t as timber unless taken for repairs, even in

4. Co. 64. that case, if to repair what has been injured by his own act — Enlarging a house or other building — & even the building a new house is waste — & if after having built it the ten.t suffers it to decay it is waste — (it is probable that these three

Co. Lit. 53. 2. Rol. 815. Cro. Jac. 182. 1. Mod. 94. ...)

2. Rol. 817. last acts would not be considered as waste in C. - Permitting a destruction of young trees by the ten.t's beasts - Selling of timber or other wood. So, altho' the ten.t is entitled to estovers, yet if he should burn green wood when there was a sufficiency of dry it would be waste (not so probably in C.) So, if the ten.t should fell timber, & with the money arising from the sale, buy other timber for repairs, it would be waste - Opening of new mines is waste; but the ten.t may dig in those already open - The cutting down or destruction of trees which are merely ornamental, & in general whatever tends to the destruction or depreciating of the value of the inheritance, is waste. -

Co. Lit. 41.

5. Reb. 12. Hob. 295.

2. Bl. Com. 282.

Any injury occasioned by the act of God, or the open enemies of the land is not waste in the ten.t but if he ~~[illegible]~~ neglects to repair the injury occasioned by that accident that is waste. -

10. Reb. 139. 2. Rol. 814.

The tenant is liable for acts amounting to waste, even tho' they are committed by a stranger - The reversioner, however if he chooses bring his action of trespass ag.t the stranger & the bringing of this action ag.t the stranger discharges the tenant. - And in this case the revers.r may declare on his own possess.n, bro hac vice. -

Co. Lit. 53.

If lessor himself commits waste, ten.t is not liable for it; nor for any omission or neglect which is the necessary consequence of such waste - If lessor destroys the timber lessee is not liable for neglecting to repair. -

11. Co. 81.

An injury done by the tenant himself to that which is excepted from the lease, is no waste; but trespass; for, of this the ten.t is not in possession. -

Cro. Eliz. 690.

A tenant may be exempted by the terms of the lease from liability for waste; but no other words than these "without impeachment of waste," will effect this exemption. And even in the case of such a lease, tho' at law the lessee can do any act amounting to waste, with impunity, yet Ch.y will inhibit malicious or wanton waste -

Hob. 234. 159.
Ti. 18.a

Waste.

It has been decided in C. that ten.t in dower of wild lands, who had cut timber for sale, built a saw mill on the land &c. was not guilty of waste, for this was the only method in which she could make the lands of any profit to her. — But the Sup.r Ct. in Ch.y will grant an injunction if necessary to prevent unreasonable waste, in such case.

2. Sw. 83.

If a dowress suffers fences &c. to decay, the reversioner may on application to the County Ct. in C. procure leave to repair them, & may hold the land, till reimbursed for his trouble & expense.

Vin. 18.r Co. Lit. 54. 5. Co. Dy. 7.th 2. Rol. 820.

The action of waste can be sustained ag.t the ten.t, only by the immediate reversioner or remainderman. It lies not after the death of the ten.t ag.t his Ex.r or heir, it dies with him.

Single damages only, were given in this action before the Stat. of Gloucester, which enacts that the plf. shall recover treble damages, & also the thing wasted.

In this action the pl. states his ownership of the inheritance, lease or ten.cy title, & his right to damages & the thing wasted &c. — In the Counce. declar.n however, neither treble damages, nor the thing wasted is demanded. Judg.t has always been given for only single damages, & costs, as at com. law, notwithstanding the Stat. of Gloucester is an ancient stat. & might be considered as binding here.

1. Sw. 25. 7. 2. Ch. 84.

II. Of Ouster.

See this title in 3 Bl. Com. 154. The term "disseisin" is used to denote an ouster of the freehold; — "dispossession", an ouster of a term for years. —

Co. 327.

Of Ejectment.

3. Bl. Com. 199.

3. Burn. 205. &c.

A lessor having a right of entry may either enter & bring the writ, which puts him in possession, or ejectment which puts him out. — A lessor having a right of entry may gain possession by entry alone, if he can do it peaceably. —

The action of ejectment at first was used only for the purpose of recovering a term for years when the lessee had been dispossessed — and it is still nominally used in the same manner tho it has been long since almost the only action in use for the trial of title to lands. — This gives rise to all the fictions which it is found necessary to make use of in actions of ejectment in Eng. — And as nothing except damages were recovered originally by the lessee, for being dispossessed of his term, so now the plf. by his fictitious lessee recovers nothing but nominal damages. But as his title is established by this action he may afterwards bring trespass for the value of the mesne profits. — And the judgment in favor of the plf. in the action of ejectment is conclusive evidence that he is entitled to all the profits accrued since the demise stated in the ejectment. But the time of the demise may be disputed & the length of the deft's possession must be proved. —

2. Bl. Com. 205. 2. Burr. 655.

In Eng. if the plf. fails in one action, he may make a new fictitious lease & as the parties upon the record will not then appear to be the same as before he may go on with another action the former not being a bar to it; & he may thus bring as many actions as he chuses; tho' if it should unreasonably harass the deft. Ch. J. Hobart would grant an injunction. —

In C. ejectment is a real action, in which there is no fictions, & which may be brot immediately to recover a fee or a term for years. — Where there is no actual ouster, but a trespassing act committed under claim of title, the owner of the land may, if he chuses, consider himself as ousted, & bring ejectm.t instead of trespass. — But no trespassing act which falls short of an actual ouster, will of itself, Mr K. supposes, furnish sufficient presumption of a claim on the part of the trespasser, to warrant the owner in bringing ejectm.t — If this be true, then, in all cases in which a mere trespassing act but no ouster is committed, it is necessary for the plf. if he brings ejectm.t to prove a claim on the part of the deft. — But whether the deft. claimed or not, trespass will lie. —

1. Bur. 110 Cro. Car. 303.

In trespass, plf. must state, before, in ejectm.t that he is out of possess.n —

In an ejectment, very great accuracy was formerly necessary in the description of the subject matter, the locus in quo &c. — thus, it was necessary to describe the quality of the land as well as the quantity i.e. whether arable, meadow, pasture &c. — The rule was, that from the description itself & without any extrinsic information the Sheriff might know what to put the plf. in possess.n of. — This rule is now much relaxed. The plf. must point out the subject matter at his peril. —

11. Co. 55. Cro. El. 399. Cro. Car. 471. 573. 1. Salk. 254. 3. Wils. 23. Cowb. 350. 1. Bur. 630. 5. Ab. 20. 3. 1. Durr. 11.

It has been customary in C. as in Eng. to bring an act.n for mesne profits, distinct from the ejectm.t — But there appears to be no sufficient reason for this practise, since their ejectm.t is very diff.t from the Eng: and as the mesne profits might as well be recovered in the ejectm.t this usage is evidently contrary to the maxim, "that the law abhors a multiplicity of suits." — In Eng. the act.n is brot ag.t a fictitious

3. Bl. Com. 267.

ejector, ag.t whom it would be unreasonable that damag for the mesne profits should be recovered. & tho' the ten tenant is made a party, yet the laws of fictions on which the action is founded, was intended to give no other damages than for the fictitious injury of ouster: the recovery being by fic ag.t the casual ejector only. – And it is observable that in Eng. before these fictions were introduced, the term itself recov ered if the term was not recov.d in ejectm.t till the time of Hen 7th. before that time only damages, full damages were recove In C. the action is brot ag.t the real wrong-doer without the intervention of fiction to recover the land. & if he pl. de- mands them his real damages: – For, that the mesne profits may be recovered in the ejectm.t is not doubted. – But the que tion is, whether the usual practice of bringing two actions ought to be tolerated? – It being established that the mesne profits may be recovered in ejectm.t the practice cannot be defended on principle: But, as it has so long prevailed, it will probably be kept to.

3. Wils. 119.

2. Ro. C. 200. 205.
3. Wils. 120.

The pl.ff in this second action may recover damages for profits accrued before the ouster stated in the ejectment. & however the pl.ff attempts to do this the deft. may contest his title, so far as re spects the mesne profits. Those arising since the ouster he cannot contest, be cause the judg.t in ejectm.t is conclusive as to them. But it seems that in contesting the mesne profits the deft. cannot rest his defence on the same defect in the pl.ffs title on which he the deft. has demurred in the ejectm.t. – But suppose that the deft. in the first action pleaded in himself a title, which the found not to have existed at the time of the ouster, might have been good before that time, may he not in this case de bend in the action of the pl.ff on the same defence. –

2. Burr. 1098. Strange 960.

Co. Lit. 200. 2. Bl. C. 194. 3. Wils. 118. 4 Vin. 314. b.

One tenant in common may bring ejectm.t ag.t another, not indeed to turn the other out but to let himself in: he may also bring an action of trespass for mesne profits: for tho' it is a general rule that one ten.t in com. cannot maintain trespass ag.t his co-tenant yet this action for mesne profits is, in effect merely an action of account.—

Ib. 350 &c.

III. Of Trespass.

3. Bl. Com. 209. 2. Rol. 555.

Trespass on real property is an entry on another's land, without lawful authority, doing some damage however inconsiderable to his real prop.y.— Or if a person enters lawfully & afterwards abuses his authority or licence to enter he will become a trespasser ab initio.—

Co. Lit. 57.

5. Bac. 150-1. 2. Sw. 75-6.

Entry on another's freehold is sometimes justifiable as in the following cases.— Debtor may go on to the land of his cred.r to pay him money— Vendee of prop.y may go upon the land of vendor to take it.— Ex.r may go upon the real prop.y of the deceased to take poss.n of the personal.— Owner of prop.y which has been taken from him may go upon the taker's land & retake it— not so if it is carried on to another's land though Coke says the law would look favorably upon such a trespass.— Owner of cattle may go on another's ground to take them when they have got there thro' any default of the latter or deficiency in his fence &c.— If one goes upon the lands of another to avoid some great calamity or injury that would otherwise befal him or his prop.y it is no trespass.— So if one who has lost goods goes without leave or search-warrant into the house of another to search for them he is a trespasser unless he finds them there:— He is a trespasser or not according to the event.—

Ib. 399.

Trespass.

This action is founded upon possession, & in many cases upon that only. And in order to maintain the action the pl. must have had possn. In Eng. it must be an actual possn. the pl. must have made entry upon the land. In C. a right to the possn. is suff. & it is not necessary that an actual entry should have been made.

2. Lu. 2v.

Lessee for life or years may maintain this action agt. strangers if he encroaches upon them; but tenant at will & sufferance cannot bring this action agt. lessor unless he invades their emblements. Neither can they have this action against any person for any injury done to the emblements. If a stranger enters upon tenant at will & injures the inheritance, the lessor alone can bring the action. But lessee for life or years may have this actn agt. the stranger in which case as well as the lessor — because they are liable to lessor in an action for such injury committed by a stranger if the lessor chuses to resort to them instead of going agt. the trespasser; but the lessor may go direct agt. the trespasser if he will & if he does it is a discharge of the lessees liability. In this case if lessee sues before lessor the latter is precluded of his action agt. the trespasser — but if lessor sues the trespasser first, the lessee may still have an action agt. him for the special damage he may have received.

2. Rol. 551. 540. Co. Lit. 4. 4. Bin. 402. 3. Bur. 1825.

Co. Lit. 5. 2. Rol. 551.

The owner of grass, herbage &c. on the lands of another may bring trespass for an injury done to them.

A disseisor who is in possn. under claim of title, however defective it may be, may maintain trespass agt. every body except the true owner — Hob. 18. which proves he may maintain it even after he has been turned out by the true owner — an action of ejectm. for a trespass committed while he was in possession — because, he is himself liable to the disseisee for this very trespass tho' committed by another. But a mere trespasser, or lessor i.e. a disseisor without claim of title, cannot maintain trespass.

2. Lu. 7v. com.

Co. Lit. 257. 2. Rol. 550 - 3. Salk. 538.

Disseisee cannot bring trespass with a continuando against disseisor for the continued injury arising from the latter's keeping him out of poss.n - the action must be merely for the act of turning him out. He must resort to his action of ejectm.t & trespass for mesne profits, unless he purges the disseisin by a subsequent entry. -

11. Rep. 51. 2 Rol. 509. Yk. 5. 7. Q. a. 554. con.

Disseisee cannot sue a stranger for trespass committed during the disseisin, nor can he sue lessee of disseisor; for tho' the disseisee is, after ejectm.t considered as having been constantly in possn. yet this fiction seems to be regarded as intended to give disseisee a remedy ag.t disseisor only: And the reason assigned for the rule is, that the disseisor is himself liable. - The rule is the same, quoad actionem, as to a disseisor of a disseisor - but yet the property of what has grown on the land belongs to the disseisee, as ag.t the 2d. disseisor & all others; & disseisee may take it wherever it may be found. - This rule seems very inequitable & unfavorable to disseisee: There ought to be a distinction between those cases in which he has recovered of the original disseisor & those in which he has not, in analogy to the case of bailm.t (vid. b. 95. a.) & of waste. (v. 353.)

11. Rep. 51.

If trespass be done upon land, & before action brot. the owner sells it, still he may have his action, for he has sustained the injury as much as if he had not sold it. & if he could not bring the action, nobody could.

Where land has been let out upon shares, as is a common practice in C. it has been here decided that both lessor & lessee may maintain the action together. In Eng. lessor must bring it alone.

2. Rol. 545.

For trespass committed by cattle, an action lies either ag.t the owner or agister. It is good defence to this action that the cattle got thro' the deft's own defective fence on to his land. If they got thro' the deft's fence whether it were defective or not, he is liable. If they entered from the high way, the deft. is liable, even if the plff's fence were defective, provided the cattle were not commonable. In C. any beasts may be made commonable, by the bye laws of the several towns. But, unless the owners comply with the conditions imposed by such bye-laws, they are liable as at com. law. -

Trespass.

4. Durn. 503.

Trespass is a local action - it does not lie for an injury done to lands in a foreign country. -

2. Ld. 545. Co. 210 a.

In bringing actions of trespass, injuries distinct in their natures are not to be included in the same declar. Distinct injuries of the same nature may be included in one declar.n - If in this last case the respective injuries terminate in themselves, & are individually incapable of repetition, the mode of declaring is to charge the def. with having done the acts "at divers days & times" within a certain period. But if the several injuries are capable of repetition, & collectively taken complete one entire injury the plff must state that the injury was committed on a certain day, & "by continuation" till such day.

Ray. 240. 820. Salk. 538. 3. Bl. Com. 212. 2. Lev. 79.

3. Dum. 29. 3. Wils. 20.

When, in an action of trespass, matter of aggravation is alleged in addition to the principal trespass, a plea which gives an answer to that which is the gist of the action covers the whole declar.n - And, if a def. would not to the matter of aggravn. plead, he must new assign. -

Of the Stat. of C. respecting Trespass on Land.

Stat. of C. 423.

The damages given by this Stat. & the rules of evidence as to the method of proof of a trespass introduced by it are variations from the principles of the com. law. Indeed the method of proof appears to be one which nothing but the most urgent necessity could have sanctioned, for it holds out a reward to the bad who will perjure himself, it allows

him double costs if after being charged with the trespass by the plf. he will swear himself clear. The penalty for cutting trees on another's land are in this Stat. so heavy that the jury will seldom find a trespasser guilty by the Stat. - the Cts. have, however, decided that if the plf. fails on the Stat. he may, in the same action, recover on common law principles if his proof is sufficient for it. -

This Stat. extends only to voluntary trespasses, not to such as are unintentional. - So if one man occasions damage to another by setting fire to brush &c. on his own land, he is not liable for it if he acted with common prudence; the Stat. in this respect is conformable to com. law principles.

St. of C. 425. When a deft. in trespass pleads title before a justice, the justice binds him in a bond of 20 dolls. to prd. his title at the next County Ct. in the county in which the land lies. The most obvious construction of the Stat. as to this point appears to be that the deft. shall commence a suit agt. the plf. - The practise, however, has been for the deft. to produce at the next County Ct. a copy of the justice's record of the original suit, & on the suit thus brot up, to make his defence. In this case he forfeits his bond, unless he adheres to the plea of title. - In other cases the deft. on removal of a cause from a lower to a higher jurisdiction, may change his plea, provided he does not go back in the order of pleading, as from a plea to the action to a dilatory plea). - If trespass is brot before a justice in a County where the land does not lie, & the deft. pleads title; in consequence of which plea the action immediately becomes local, the action cannot be brot before the County Ct. in the manner just described. - For title to real prop.y must be tried in the County in which the land lies; but the record of the justice can be sent to the County Ct. of that County only, in which the original suit is brot. - In this case c. 11, s. 8. further provides that the deft. must commence an action of ejectm.t in the proper county, to try the title; for, the bringing of the action before the justice is sufficient to warrant the deft. in furthering himself against. - The Stat. further provides,

that if a deft. after pleading title before the justice refuses to c[illegible] trouve his plea shall abate, & the justice shall proceed to try the cause &c. Mr. R. supposes that if no other plea be pleaded judgm. must go by default, notwithstanding the words "to try the cause" in the same manner as if no plea at all had been made: for the fact pleaded by the deft. cannot be tried in issue before the justice, & as no other fact is pleaded & as the justice cannot himself make an issue, it seems that there is no other way of rendering judgm. than by default.

Of Nuisance.

3. Bl. Com. 215.

A nuisance is defined to be that annoys or incommodes a person in the enjoyment of his real property.

Nuisances are of two kinds: Public, & Private.

1. Haw. R. 197.

A public nuisance, which is one that is a detriment to the public at large as the stopping up of a highway &c. is indictable as a public offence: but no private person can sustain an action for it unless he has received some special injury.

9. Rep. 58. Cro. Eliz. 116. Cro. Car. 110. 2. Rol. 141. 1. Bur. 133. 2. Sw. 85.

"Private nuisances are those which are a hurt or annoyance to some individual. They are of various kinds, such as overhanging one's house, obstructing ancient lights. qu. are there any ancient lights in this country? & would not an action lie for stopping up of modern lights? contaminating the air around one's dwelling house, so as to render it unwholesome, obstructing or corrupting water-courses, obstructing a right of way &c.

9. Co. 58. 3. Bl. C. 31.

In Eng. the setting up of a tavern or a mill ferry &c so as to take away the custom of one before established have been considered as a nuisance & actionable; but it is questionable whether they would be so considered here.

2. Law. 85.

The remedies for persons injured by nuisance are of two principal kinds: the first extrajudicial, or by mere act of the party injured. The second judicial, or by suit. The first is by abatement; any person injured by a nuisance having a right to destroy it or abate it; but this abatem. must not be by a violation of the peace. Any person may abate a public nuisance.

3. Bl. Com. 5. 220.

2 Vin. 315.

3. Bl. Com. 222.

Judicial remedies, of which there are three, the most usual now is, by an action on the case, in which damages only are recovered. The assize of nuisance, & the quod permittat prosternere, are, however, still in force.

The plf. may bring his action on the case, as often as he pleases, tho' the wrong doer removes the nuisance; for, not removing of a nuisance after action brot is considered as a new erection of it. The jury in this action are never to give damages for any future injury that may arise to the plf. that is to be redressed by another action.

Salk. 460.

Of Forcible Entry and Detainer.

At com. law, a man might not only forcibly defend as he still may but also forcibly resume his tenement & forcible enter on his real property. But, by a Stat. of which comprizes the substance of the Eng. Stats. on the subject, forcible entry whether the person making it had a right to enter or not as also a forcible detainer, if the person making it had no right to detain, is a private injury, & a public offence. A forcible entry either an actual entry or an attempt to enter, when the entry or attempt is made or accompanied by words or actions, which have a tendency to terrify. No fraud, contrivance or circumvention to get possession amount to forcible entry. A mere forcible attempt to enter, is, when considered as a crime merely, the same as an actual entry; but to constitute the civil injury of a forcible entry, there must be an actual entry, & ejectm. of the tenant.

So that, whether the tenant in possession owned the possession rightfully or not, or even if he has no right at all to detain it, the law so far abhors all violence, that the true owner may not entry it to gain the possession which he has a right, but he must resort to his legal remedy. 2u. *If a person should leave his house merely on a visit or journey &c. & on returning should find an intruder in possession, might he not enter by force? would not this be regarded rather as a forcible detainer, than an entry?!

*vide 304.

A forcible detainer may happen in two cases:

2. Sw. 72. 1. Where there has been a forcible entry: for, after a forcible entry, even tho' made by the real owner, a detainer by force is unlawful. the law not allowing any advantage to be gained by force, where force is prohibited.

2. Where the tenant in possession having no right to the

possession detains with force; however the possession may have been obtained. If he has a right to the possession detaining by force is not unlawful.

A forcible entry, & a forcible & wrongful detainer may both happen at the same time, & both parties be punishable. ex. gr. A. ten. in possession but having no right to possession, by force holds out B. the rightful owner who gains or attempts to gain possession by force.

The corollary to be deduced from the foregoing propositions, & which contains the substance of the law on this subject is this. A person rightfully & legally in possession may preserve himself there by force; tho' if he has no right to the possession which he holds, such detainer by force is unlawful — But, a person out of possession altho' he is legally entitled to the possession can never in any case be justified in using force to obtain it.

Qu. vide 303.

The question of forcible entry &c. is tried under the Stat. of C. by 18 freeholders, under the direction of the Sheriff composing what is called the freeholder's court. In this trial, no enquiry is made respecting the title; but the parties are replaced in the same situation in which they were before any force was used, & are left to try the title as at com. law. If the rightful owner has been turned out, he shall recover treble damages in his action of trespass; & the verdict given in the freeholder's Ct. is conclusive evidence in that action, that he was turned out.

Stat. of C.

It has been decided by the Sup. Ct. in C. that if one having a right to a house, forcibly enters & holds ~~out by~~ force the person kept out, altho' he has no right to it, poss. may still maintain trespass for such entry & detainer; but the damages in this case must be merely nominal.

2 Sw. 72.

When the action is brot merely for a forcible detainer without entry, the right of possession must be examined, because if deft. has the right of possession he has a right to detain forcibly.

Of the Stat. of Limitations as to real Prop. in C.

Under this Stat. it has been settled by adjudication that a complete title to lands is gained by 15 years adverse possn. These adjudicns are founded on the principal established in C. that he who has st. title to land has the possn. in law, & that when the legal possn. is lost, the title is lost with it.

But this possn. must be an adverse one; therefore, if A. & B. agree to run a fence when what they suppose to be the line of bounds between their respective lands, & a mistake is made, in consequence of which one holds lands belonging to the other for 15 years no title is gained by such possn. for it is not adverse.

Tho' one, who has been in possn. 15 years is not obliged to avail himself of the Stat. of limitns yet if an exon. is levied on such land for the debt of the person lo in possn. a good title is acquired the pltf. in the exon. — Tho' if such land is sold by the person poss. the vendee may sue an action brot by the real owner, as the Stat. of Lim. ns as the vendor might have done.

If mortgor remain in possn. after ejectm. brot by mgee for 1 year, still it has been adjudged in C. he acquires no title. it will presumed, that he was in as tent. at will under mortgee. If in C. case the land had been sold by the mgor nothing except the equity of redemptn would have passed.

If one, not knowing of a mortge purchase the land of the mgor & remain in possn. 15 years, it has been a question whether mgees right is not barred. 2d. Are not the Records in C. constructive notice to such purchaser?

Flow. 312. 4. Stat. of Westm. empowers any person to abate a nuisance erected in the highway at any time within 15 years after its erection. It has been generally understood that the person who, by fencing in a part of the highway & thus erecting a nuisance, gains no title under the Stat. by 15 years possn., but that after the expiration of that term, he is still liable to an action. In a late case, however, in which this case was collaterally mentioned, part of the Sup. Ct. held a contrary doctrine.

Suppose A. goes into possn. of lands belonging to B. & remains possn. 10 years, then sells to C. who remains in possn. 5 years. A. is sued in ejectm. by B. can he defend himself under the Stat. of Lim.ns?

Of Public Wrongs. –

Of Felony. –

4 Bl. Com. 95. Felony is any crime which at com. law occasions a total forfeiture of goods or lands or both. –

Ability to read was formerly considered as proof of being a clerk or clergyman, & the benefit of clergy was extended to all who were able to read. But women being by reason of their sex excluded from the clerical office were never entitled to the benefit of clergy. The Stat. 5th of Anne extended the benefit of clergy indiscriminately to all persons guilty of clergyable offences. –

4. Bl. Com. 370-373-4. &c. –

All those offences, which in Eng. are called felonies go under the same appelation in U. S. but forfeiture is not here a consequence of such crimes, as it is in Eng. —

4 Bl. Com. 220. 1. Arson is the malicious & wilful burning of the house or outhouse of another person. This is a com. law felony, & one not entitled to the benefit of clergy.

Outhouses, the burning of which is arson, must be within the curtilage or homestall, or adjoining a dwelling house. – This applies to outhouses which are empty. If they are filled with corn or hay, the burning of them is arson whatever may be their situation. –

4. Bl. Com. 221.

Public Wrongs. – Arson – Burglary. –

1. Hawk. 105. So, the burning of stacks of corn, ~~&c.~~ is arson; & also fences if a dwelling-house is endangered thereby. –

Cro. Car. 377. The wilful burning of one's own house, is also arson, provided another's house is thereby burnt: a mere ex-house of another's house, by burning one's own, is not arson. – If a house is leased, the wilful burning it, either by lessor, or lessee is arson. –

1. Hawk. P.C. 100. It is not necessary that the house be entirely consumed; the least burning is enough to constitute the crime. –

The burning must be wilful & malicious; the greatest negligence will not make it arson. – If the burning was occasioned by negligence in the prosecution of unlawful business it is not arson. –

Stat. of C. 182. 185. The Stat. in C. is the same as the com. law, on the subject of arson, except that by the Stat. the burning of any, & consequently of one's own, house, is arson. – The punishment is Newgate, except when "prejudice or hazard happens to the life of any person", in which case it becomes a capital offence, & is punished with death –

4. Bl. Com. 224-5. 1. Hawk. P.C. 101. 2. Burglary, is the act of breaking & entering into the mansion-house of another, in the night season, with an intent to commit a felony. –

1. Hawk. 81. Kely. 42. 30. 67. 1. Stra. 481. Not only the forcible breaking of a door &c. has been considered a breaking, within the definition, but also picking a lock, unlocking a door – lifting a latch – coming down a chimney – the entering a hous

2. Stra. 881. by Stealth in the day-time, & breaking out in the night, & also the entering a house in the night, by fraud, as if the door, upon knocking should be opened, & the burglar should then rush in, have all in their turn been adjudged to be a "breaking" so as to constitute burglary. — If a door or window be open, so
1. Hawk. 102. that he can go in & out, it is not burglary, & yet, if after having entered in this way, a door is opened, it becomes burglary — But, it must be the door of some apartment; the opening of a chest, or a trap, or beaufet not being suff.t to make it a "breaking". —

Breaking by one of a number combined, is a breaking in all. —

4. Bl. Com. 227. As to what shall constitute an "entry" it has
1. Hawk. 103. been determ.d that the putting in of only a part of the body, a hand, a hook by which to draw out any thing a pistol, is an entry. — The turning of a key has been once decided to be an entry, — probably on the principle, that one end of the key was within the house. —

4. Co. 40. It must be "a mansion house" — This has been extended so as to include not only dwelling-houses, but
Kely. 54. also any out-buildings which are within the curti-
Poph. 42. 52. — lage, or parcel of the mansion-house; & stores, or
4. Bl. Com. 224. shops, in which any person usually sleeps; the prin-
2. Durn. 502. ciple which governs in this case being, that the ~~house~~ ~~is entered~~, breaking & entry, should be such an one as has a tendency to terrify & affright some person —
1. Hawk. 104. The breaking of a store containing goods but remote
Stat. of C. 184. from the dwelling-house, is made burglary by Stat. —

In the indictment the house must be stated, as
Kely. 27. — belonging to the tenant, if he has any interest in it; if he has not, as if he be tenant at will, it must be stated as belonging to the proprietor. —

7. Co. 6. The term "night-season" comprehends in its legal accept.n, that portion of time which intervenes between the evening & morning twilight. —

Public Wrongs. Burglary. - Larceny. -

"With an intent to commit a felony." It is no matter what kind of felony, & the presumption is that the breaking & entering is for the purpose of committing some felony, unless otherwise shewn. -

1. Hawk. 105.

Punishment, in Eng. death, in C. Newgate -

3. Larceny under the Eng. law is divided into simple & mixed. - Simple Larceny is the felonious taking & carrying away the personal goods of another. When the property thus taken amounts to more than 12d in value, it is called grand larceny; when under that sum it is denominated petty larceny. - In C. no distinction between these offences obtains. - In Eng. there is no difference except in the punishment; grand larceny being a clergyable felony, petty larceny only a misdemenor, punishable with whipping & imprison^t. -

4. Bl. Com. 229.
1. Hawk. 89.

It is "a felonious taking" - i.e. it must be taken animo furandi, & not thro' mistake &c. "Taking" implies "without the consent of the owner." - Under this has arisen the question, whether a bailee could be guilty of stealing the property bailed to him, he having obtained possession of it, by the consent of the owner. - It was formerly held that he could not, but now, if one having procured a bailment with an intent to commit theft, actually purloins the goods so obtained, he is guilty of theft, the bailm^t being extinguished by the

4. Bl. Com. 230.
2. Bac. 473
4. Wd. 535. 197.
Leach's Crown Law 95. 213. 207.
5. Durnf. 175.

fraud. But if the intent to steal, is subsequent to the delivery, the purloining them is not theft. —

There must be "a carrying away". — This is any, the least remotion of the property from the place where it was, with an intent of carrying it off; as, if the thief be discovered, & drop it. it is still larceny. —

1. Hawk. 93.
2. Vent. 215.

Larceny must be committed "in personal goods". — Things therefore which savour of the realty, or adhere to the freehold, are not objects of larceny. as, apples on a tree, corn growing in the field &c. — The taking of these is simply a trespass. — The distinction, however, is very nice. If the act of taking, is not one continued act, as, if after picking the corn, it should be left to prosecute any other business, & then afterwards taken, it would be theft. — Mck. thinks the whole distinction rather frivolous, & that it would have been more rational & consistent with principle to have determined all such acts to be theft. — A variety of Stat. in Eng. have reached most of these cases of trespass & made them theft; but in C. there are no Stat. of that kind, & the com. law still prevails. —

4 Bl. C. 232.

At Com. law, theft could not be committed in choses in action & evidences of debt; they not being considered as having any intrinsic value; it has therefore been necessary in Eng. to make Stat. covering this species of property. — In C. there are no Stats. on the subject: But Mck. thinks that the principles of the com. law will reach it, without any Stat. —

8. Co. 33
1. Hawk. 93.

As to animals feræ naturæ &c. See author: margin. It must be an animal which has been reclaimed from its savage state, & become tame; & also, an animal of some use for food or cloathing. Stealing of dogs & cats therefore is not theft. —

1. Hawk. 93.
4. Bl. C. 235.

As to husbands liability for the theft of his wife See p. 18.

Ante. 18.

For punisht. of theft in C. see Stat. —

St. of C. 413.

Public Wrongs. — Robbery. —

4. Bl. Com. 242. Robbery, (which is one species of mixed larceny), is the felonious & forcible taking of goods or money, to any value, from the person of another, by violence or putting him in fear. —

4. Bl. C. 241-2. 1. Hawk. 95. There must be "a taking". — An attempt to commit a robbery, therefore, at com. law, does not amount to the crime of robbery, unless there has been an actual taking of the property. By Stat. Geo. 2d. it is made felony punishable with transpor.tn. As there is no Stat. concerning it in C. it remains here as at Com. law a misdemesnor.

A restoration or redelivery of the property, by the robber, after a taking does not purge the offence.

1. Hawk. 97. Taking "from the person" is construed to mean "taking in his presence"; therefore if one should by violence or putting him in fear, drive away cattle from before the eyes of the owner it would be a robbery. —

1. Hawk. 95-6. The "violence or putting in fear" necessary to constitute robbery, must be previous to the taking. — Actual force is not necessary: putting in fear is sufficient violence. — As, if the assailant, by menaces, extorts an oath from the person attacked, that he will deliver his money at a future time, & he does deliver it, this is robbery. — So, if a robber beg alms but does it in a way which terrifies & forces compliance it is robbery. —

All persons present, aiding & abetting before the fact, in robbery are principals. —

Punisht. in Eng. death. In C. Newgate for life.

4. Bl. C. 239. 240. 1. Hawk. 98. Privately stealing from the person (as, by picking the pocket &c.) and stealing from the house in the day time, are the other kinds of mixed larceny. — At com. law they are both punished like simple larceny. But, by Stat. in Eng. they are made felony without benefit of clergy. No Stat. in C. —

Of Homicide. —

Homicide, or the killing of a human creature is sometimes a crime, & sometimes not. — The law in distinguishing between the criminality or innocence in this case, principally regards the intention with which the act was committed. — Homicide may therefore be justifiable, accidental or excusable, manslaughter, or murder. —

4 Bl. C. 178-9. 1. Justifiable homicide is where there is no guilt at all in the slayer: as is the case of an executioner who
1. Hawk. 69, 70. in pursuance of a legal sentence puts a man to death. — But if the executioner in this case puts him to death in a way variant from the sentence, it is murder, unless he substitutes a milder & more easy death for one which is lingering & cruel; & even in that case he is guilty of a high misdemeanor. — So, if an officer in the regular execution of legal process, is resisted & kills the person resisting him it is justifiable. — So, if a person is killed while attempting the commission of an atrocious crime, & for the purpose of preventing that crime, as, if a woman should kill a man attempting to ravish her, it would be no crime in her. —

1. Hawk. 173. 2. Accidental or excusable homicide, is where
4. Bl. C. 182-3. a person kills another, thro' accident or misadventure, &
Cro. Car. 538. without negligence or a want of due care. — But in this case the business or occupation of the person killing, must, at the time of the happening of the accident, have been lawful; as if a man working with an axe, the head flying off should hit another & cause his death, this would be excusable homicide. — So, if a parent or master, by a moderate & proper correction of a child or servant, should unfortunately occasion his death, it would be excusable homicide — So, where a man Se defendendo, in defence of himself or his property, kills another, it is excusable. As, if he should kill a robber who attacked him, or a thief who broke into his house in the night season. —

1. Hawk. 174-5. Under this head is included what is called chance-medley, which is where one upon a sudden quarrel, brawl,

or affray, is attacked by another & having no other way of defending himself, kills the other — It is frequently very difficult to distinguish this from man-
4. Bl. Com. 184. slaughter: Blackstone has pointed out the distinctn as clearly as possible.

4 Bl. Com. 190. 1. Hawk. 70. 3. Manslaughter, is the unlawful killing of another without malice express or implied: and is of two kinds, voluntary, & involuntary. —

Voluntary manslaughter, is where the killing was upon a sudden gust of passion, excited by some kind of provocation. If one kills another without provoc.: malice is always implied, & it is murder. As to what is sufficient provoc.: it is difficult to lay down a rule that will reach all cases. — Mere
4 Bl. Com. 200. words or contempt or reproach, will not so far justify a man for killing another, with an instrument which would naturally occasion death, as a sword, for instance, as to render him guilty of mansl.r only, but it would be murder. But if in consequence of such words, the person should strike the other with his fist, or a cane &c. & death should ensue, it would be manslaughter. — But no provoc.: however great,
+ Vid. 370 will reduce a voluntary killing to mansl.r if, between the provoc.n & the act of killing, there has been suff.t time for the passion to subside. This question, whether there has been sufficient time or not, will be frequently agitated in case of duels. No general rule can be established, but each case must rest on its own circumstances.

Involuntary mansl.r may happen in two cases
1. Where a person in the prosecution of an unlaw-
4. Bl. Com. 192. ful act, occasions the death of another, it may, according to the Eng. decisions, be either murder or manslaughter according to the nature of the act in the doing of which the death was occasioned. If the act were a thing malum in se, & a felony, as, if in attempting

to commit a theft, a man should be killed by the thief it would be murder. But, if the unlawful act amounted only to a trespass, it is then manslaughter. — Mr. R. thinks this distinction is not well founded, for there does not appear in either case, that malice is necessary to the very essence of murder. — 2. If one doing a lawful act, kills another thro' gross & culpable negligence, he is accounted guilty of mansl.r —

12. Co. 87. The punishment of mansl.r under the Eng. law, is forfeiture of goods & chattels, & burning in the hand (it being a clergyable felony) without any distinction of the different kinds, tho' there is evidently a difference in the criminality in the different species. —

St. of C. 285. In C. by Stat., voluntary mansl.r with forfeiture of goods & chattels, shifting, branding in the hand, & disability to give verdict, or evidence in a Ct. of justice. Involuntary mansl.r is left as at Com. law, tho' it has been the practice, unauthorized by Stat. to punish the second kind with a heavy fine only. —

4. Murder is defined to be, "the unlawful killing, by a person of sound memory & discretion, of any reasonable creature, in being, & under the peace, with malice aforethought, either express or implied. —

4. Bl. Com. 195. & 1. Vent. 158. Stra. 481.

It must be a "killing." It is not necessary that the death should be outright. If it happens within a year & a day, by the Eng. law, it is murder. —

1. Hawk. 79.

"By a person of sound memory & discretion." — Intoxication tho' a species of temporary insanity, is no excuse for murder. But habitual debility of mind produced by a long course of intemperance is a suff.t excuse. —

4. Bl. Com. 25.

Public Wrongs. – Murder.

An idiot cannot be found guilty of any crime; nor can a lunatic, except for those which he commits in lucid intervals: & even in these cases, if he becomes insane, before arraignment, he cannot be arraigned. – And if an offender becomes insane in any stage of a criminal process ag^t. him, or at any time before execution, the proceedings must be stayed. – Child

4. Bl. C. 25. 395.

1. Bl. Com. 464. under 7 years of age can never be tried for murder; Those of 14 & upwards are never excused thro' want of age Those between 7 & 14 years of age, may be found guilty or not, as they appear to be, or not to be, dolo capaces. –

4. Bl. C. 25. –

Any degree of coercion exercised by a third person, (as by a husb^d. over his wife) to induce the commission of murder, is no excuse for the crime: And yet, there may be cases of this kind in which it is impossible to discover malice prepense. –

"Of any reasonable creature in being." The killing of a child in ventre sa mere appears not to be murder but if a person, intending to kill a child in ventre inflicts upon it a wound of which, after being born, it dies within a year & a day he is guilty of murder. –

4. Bl. C. 198.

1. Haw. P. 80.

The Stat. 21st. of Jac. 1st. enacts, that if the mother of a bastard child conceals its death she shall be accounted guilty of murder unless she can prove, by one witness at least, that it was born dead. Of this Stat. that of C. on the same subject, is substantially a transcript. But Cts. of Law have so construed the Stat. both in Eng. & C. as to transfer the onus probandi, from the mother of the child to the prosecutor, by requiring evidence suff^t. to convince the mind, that the child was actually born alive – It is observable that the Stat. of C. was made after the construct^n was given to the Eng. Stat. It is clear that the words of neither of the Stat^s. will warrant this construct^n. ——

The last, by far the most important part of the definition is, "that it be done with malice aforethought either express or implied." — Malice whenever used in law, always implies nearly the same thing, a bad evil, wicked motive, unjustifiable upon any principles of honesty or conscience — a disposition which shews its possessor to be devoid of all social feelings, or interest for his fellow creatures, & actuated by a depraved & abandoned heart —

4 Bl. Com. 198-9.

Most of the cases, in which there is difficulty in distinguishing between murder & manslaughter, are those in which there has been a provocation; the question being whether it is sufficient to justify the killing of the person giving it, & in the manner in which he was killed. — For, if one merely make mouths or ridiculous gestures at another, & the one insulted should take a gun & shoot the other insulting him, it would be murder; for it would shew him to be a person of such an irritable temper, & one who cared so little for the lives of his fellow-men as to destroy them upon the slightest provoc.n that it would be dangerous for him to remain in society. — So, where a park-keeper finding a boy in the park tied him to his horse's tail which dragged him in such a manner that he died; altho' the man was provoked by finding him in the park, it was held no extenuation of the murder. — So, if the provocation has been ever so great, if there has been time for it to subside, the killing will be murder — & to what has been considered a suff.t time see author.s in margin — The case in Coke, which carries the doctrine farther in favor of manslaughter than any other, is differently reported in Cro. Jac.

Stra. 499.
Cro. Car. 131.
Palm. 545.
1 Hawk. 81.
+ Id. 374. b.
Kely. 50. 27.
58. 129.
1. Lev. 80. 180.
12. Co. 87.
Cro. Jac. 290. s.c.
2 Ld Ray. 1493-8.
Stra. 773.

The case in Kelyng^e has induced an opinion that if the one who ~~kills the other~~ gives the provoc.n finally kills the other, it will always be murder, but this is not the case, as he may kill the other entirely in self-defence. —

+ Kely. 119.
2 Ld Ray. 1489.

Public Wrongs. — Murder. —

If the design was to murder A. & by mistake
4 Bl. Com. 201. B. is killed, it is murder, altho' there was no malice towards B. — So, if the design to kill is not directed towards any particular person but towards any one who may chance to be injured it is murder; as if one
Ib. 200. should discharge a gun among a multitude, or let loose a wild animal among a number of persons, & one should be killed, it would be murder. —

Where in consequence of opposition to an officer, either he or any of his assistants is killed, it is murder not only in the person who actually did the fact, but all who aided, & abetted him — So, where a
Kely. 55. person, attempting to part two who were fighting, in order to prevent a breach of the peace, was killed, it was held to be murder. —

If an officer should attempt to arrest a man for a felony, with a void warrant, & should kill him in doing it, it would be murder, if the warrant was void on the face of it, otherwise not. —

Where a gaoler most inhumanly confined a pri-
Stra. 856. soner in the same cell with one who had the small pox, by which he caught it & died, this was holden to be such an evidence of malice as made it murder
So, where he confined a prisoner in a low, damp, un-
Stra. 884. wholesome room, without allowing him the common
2 Ray. 1578. conveniences which decency require; by which the habits of his body were so affected that he died, this was adjudged to be murder. —

The punishment of murder, in Eng. & U.S. is death with forfeiture of goods & chattels. —

Public Wrongs.—

Of Perjury.—

4. Bl. Com. 137. 1. Hawk. 170. 2. Sw. 318.

Perjury is defined to be the crime of swearing wilfully, absolutely & falsely, in a matter material to the issue or point in question, under a lawful oath, administered in some judicial proceeding.—

3. Mod. 348.

False swearing before a Ct. not of record, was formerly holden to be no perjury – it is now otherwise –

Cro. Jac. 158. 3. Mod. 122. Stra. 542.

Subornation of perjury is the procuring a person to commit perjury. And in order to render the Suborn.ᶜ a crime, the perjury must have been actually committed.–

Salk. 513. 5. Mod. 350. 10. H. 195.

The swearing must be wilful. If it was done thro' inadvertence, mis apprehension &c. it is not perjury.–

1. Hawk. 175. con.

Swearing "according to the best of one's belief," is not such a qualification of testimony, as will exempt the witness from the crime of perjury; if it appears that the witness did it wilfully & with an intention of testifying wrong.–

1. Hawk. 175. Palm. 294. 6. Durn. 637.

It is not necessary that the fact sworn to should be absolutely false, if the witness believes it to be, or if knows nothing about it.–

1. Hawk. 175. 1. Sid. 274. Salk. 514. Mod. 53. Cart. 422.

If the point sworn to is wholly foreign to the cause, it is not perjury; but if it can affect it only remotely, as to raise or lessen the damages &c. it is perjury.– Hob. is of opinion that it ought to be considered perjury, if the witness thinks it material to the cause, tho' it actually is not.–

Palm. 382.

Yelv. 111. 72.

The oath under which the witness testifies must be lawfully administered. If it is extrajudicial it is not perjury.– But it may be made be made by way of affidavit by a party in his own cause, or by a person offering himself for bail & swearing that his property is greater than it in fact is.–

1. Hawk. 172-3. Cro. Car. 140.

Public Wrongs. – Perjury. —

The false swearing must be in some judicial proceeding or it is not perjury. – But it is not necessary that it should be before a Ct.; as it may be before arbitrators, auditors, commissioners &c. – The breach of their oaths by a Jury is not perjury. To constitute perjury, the thing sworn to must be a fact, & by way of testimony. – A breach of an office oath, therefore is not perjury; but a high misdemeanor.

1. Hawk. 172-3.
2. Rol. Ab. 257.

St. of C. 339. 185.

The punishment of perjury & subornation of perjury in C. is imprisonm.t for 6 months in Newgate, forfeiture of 67 Dols., disability to be a witness, & in case of inability to pay the fine, with setting in the pillory. – The Stat. of C. mentions Cts. of Record: but Mirk. supposes that com. law perjury was intended. – It is, however, still punishable in C. at com. law, viz. by fine, impris.t pillory, & disability to be a witness. But this impris.t at com. law cannot be in Newgate, except on convictions in Hartford county, in which county Newgate is a public prison.

Public Wrongs. Forgery. —

4 Bl. Com. 247. Forgery is the fraudulent making or altering of a writing, to the prejudice of another's right. —

1 Hawk. 182-4. At Com. law, the crime of forgery consisted only in the altering &c. of instruments of a public nature, such as records &c. and wills. The altering, therefore, of instruments merely of a private nature; as, notes, bonds, &c. was not forgery at com. law. The com. law punishment was fine, imprisonment, & pillory. —

But, by a variety of Eng. Stat.s the crime of forgery has been extended to almost all instruments of a mercantile nature, such as notes bills of exchange, endorsem.t thereon, bank-bills, lottery tickets &c. but the altering &c. of any instrum.t not comprised in any of those Stat.s nor included under the com. law, would not be forgery. —

St. of C. 184. The Stat. of C. ag.t forgery, is made with reference to the Eng. Stat.s on the same subject, & makes the same acts forgery, as are so made by the Eng. Stat.s & "any other writing, to prevent equity & justice" This clause involves the quest.n what alter.as &c. have a fraudulent & inequitable operation. —

2 Bl. Com. 308. Sal. 375. The alteration of an instrument without a fraudulent intent, is not forgery: but if made in a material part of the instrument it vitiates it. — But an alter.a made with a fraudulent intent, tho' in an immaterial part is forgery; & forgery, whether in a material or immaterial part, always vitiates the instrum.t —

An alter.a made for the purpose of conforming the instrument to the terms of the original cont. is forgery, if made to benefit the person, who makes the alter.a —

Public Wrongs. — Forgery. —

Salk. 375. Moor. 655.

The act must be done with an intent to defraud, & to the prejudice of another's right. — therefore the alter.ⁿ of a sum contained in a bond, &c. by the obligee himself, in favor of the obligor is no forgery as, if the alter.ⁿ be of pounds into shillings. —

1. Hawk. 183. Moor. 750.

It may here be a question, whether the omission of a legacy &c. in a will, by the draftsman, purposely, would be forgery or not? — Mr. R. thinks it would, especially if there were a residuary legatee who would be benefited by

Moor. 655. 759. Stra. 89. 3 Mod. 88. 8. 96. 192.

Antedating a deed, to defeat another's right, is forgery; as, is also the fraudulent insertion of a legacy to one's self, in another's will — The latter act would probably destroy only the legacy, & not the whole will the rights of third persons being concerned in the will

Moor. 619.

Writing an oblig.ⁿ over another's name accidentally written, is also forgery, if done with a fraud.ᵗ design. —

St. of C. 184.

The uttering & publishing a forged instrum.ᵗ knowing it to be such, is punished by our Stat. in the same manner, as the forgery itself. —

St. of C. 184-5

In C. this offence is punished by Stat. with imprisᵗ in Newgate, paym.ᵗ of double damages, to the party injured, & disability to testify &c.

Of Rescue, & resisting criminal process. —

4 Bl. Com. 131. Rescue is the act of forcibly, & knowingly freeing another from arrest or imprisonment.

At com. law the person rescuing is accounted
2. Hawk. 139. guilty of the same offence with which the person rescued was charged. But, in this case as in those of voluntary escapes, the offender is not punished till the principal or person rescued has been convicted. — If the principal is not caught & convicted, the rescuer is punished for a misdemesnor only. —

In C. a rescue, in all cases, is only a high misdemesnor. — Assisting a prisoner to escape from Newgate, is punished by confinement in Newgate. —

Resisting criminal process, or assisting one to
4. Bl. Com. 129. avoid being taken for a crime, renders the person so assisting, a particeps criminis, an accessory in felony, & a principal in high-treason, & subjects him to the same punish.t as the principal. —

Of Riots, Routs, & Unlawful Assemblies. —

A Riot is defined to be "the assembling together
1. Hawk. 159. of three or more persons, for the purpose of assisting each other, in the carrying into execution an enterprize of a private nature, whether it be lawful or unlawful, & the carrying of the enterprize into execution, with force, & to the terror of the people." —

There must be "three or more persons"; therefore,
2. Hawk. 441. if upon an indictment of several, the Jury find all
Poph. 202. not guilty, except two or less, they are innocent of
Salk. 385.

course, unless the verdict is "that those two, with others unknown did the act" &c. Infants under the
1. Hawk. 159. age of discretion are said not to be punishable for a riot. — Qu. If two adults with one infant, shall commit acts amounting to a riot, would they be guilty of a riot? —

They must "assemble together with an intent to commit &c. and this intention must be executed." If they only assemble together with an intent to do certain acts, but do not proceed towards doing them, is
4. Bl. Com. 146. is then an unlawful assembly. — If they proceed or move forward to do it, but before the execution
Ib. relinquish it, it is then a Rout. — If they assemble together upon a lawful occasion, as at a fair, mar-
4. Bl. Com. 145. — ket &c. & a tumult, quarrel &c. accidentally ensues,
Salk. 595. it is then an Affray. — If after having assembled
1. Hawk. 150. — together, they enter into a confederacy for the purpose of committing an act &c. & do commit it, it is a Riot, tho' they did not literally assemble together with the intent. —

The enterprize must be of a private nature.
1. Hawk. 157. If it is of a public nature it may amount to treason. — As if it be to disturb Cts. of Justice, to reform religion &c. —

It is essentially necessary to constitute the offence of a riot, that the object of the rioters,
1. Hawk. 157. be effected, "with force, & to the terror of the people". It is presumed, however, that positive testimony of any person being actually frightened, is not necess.
Ib. — If the acts done, are executed in such a tumultuous manner, as would naturally affright & terrify, it is sufficient to make it a Riot. — So, if the act done is an unlawful one, yet if it be done in a manner not tumultuous or tending to terrify, it would not be a riot. —

This is the com. law on the subject. —

The punishment at com. law, is fine, imprisⁿ & pillory. The Riot-act, in Eng. has not altered the offence, but has rendered the punishmt. different, when the riot act is read. — Any opposition to the reading of the riot act, is punished with death, without benefit of clergy. —

St. of C. 301. The Stat. of C. agⁿ. riots extends to unlawful acts only. So that if the act committed in a riot be lawful, the offence, it seems, remains as at com. law. It is most probable, however, that the Stat. was intended to comprize all com. law riots. —

2. Sw. 340. Under this Stat. it is not necessary, to constitute a riot, that the riot-act be read. But this is necessary, to subject the rioters to the Stat. penalties. And, by the Stat, if it is read, the rioters are subjected to the penalties, altho' they have not committed the act intended. But, if they commit the act, & it be an unlawful one, the Stat. penalties are incurred, whether the act was read or not. —

The punishⁿ. imposed by the Stat. agⁿ. riots is fine, imprisⁿ. or whipping, or all three, at the discretion of the Ct. —

Over Riots, the Supr. & County Cts. have concurrent jurisdiction. —

Of Treason. –

St. of C. 184. Counterfeiting the coin, is not treason in C. but that & the making instruments for coining are crimes punishable by confinement in Newgate –

The only offences that are treason in C. are the levying war agt. the government; or, adhering to the enemies of the land. –

4. Bl. Com. 81–2. Doug. 570. Rex v. Ld. G. Gordon. Levying war agt. the govt. may consist not only in an open rebellion for the purpose of overturning or destroying the govt. but it may be done by taking arms for the purpose of effecting a reform of religion, or any other public matter – So an attempt to obstruct the regular course of justice; or any attempt at a general destruction of property as to destroy all enclosures, or all brothels would be high treason. –

1. Hawk. 38. 4. Bl. Com. 82–3. Adhering to the enemies of the land, means foreign enemies; & consists in the affording them any aid or support, as sending intelligence, supplying them with arms or provisions &c. But the assisting a rebel who has fled to a foreign country, is not treason. –

St. of C. 419. The Eng. law requires two witnesses to convict of treason – Our Stat. has not made it necessary – Ordinary proof being enough. Punisht. is death –

4. Bl. Com. 134. 1. Hawk. 243. Barratry is the frequently exciting & stirring up of law suits – The carrying on of one's own law suits is never barratry, however false & groundless they may be. Any conduct, as, the invention of stories, sowing of discord among neighbours &c. & thus getting them into the law, & doing this frequently, constitutes barratry. – In the indictment it is necessary to state that the deft. is a common barrator. – This is considered as a crimen falsi, & disables the offender from being a witness. –

8. Co. 30. The punisht. is fine, imprisnt. & a bending to good behaviour. –

4. Bl. Com. 134-5. 1. Hawk. 249. Maintenance is the offence of promoting law-suits by assisting one party to maintain the suit, by supplying him with money &c. This, however, is allowed, & is no offence, where the person assisting has an interest in the suit, or where the party whom he assists is his kinsman, servant, or poor neighbour.

St. of C. 200. The selling of pretended titles, or a sale of land whereof the seller is not in possession, is a species of maintenance & is punished by Stat. in C. with rendering the deed void, & a forfeiture of half the value of the land thus sold. In the construction of this Stat. it has been held, that the person in possession Plowd. 88. must be in, claiming by a title adverse to that of the seller.

1. Hawk. 250. 4. Bl. C. 135. Champerty is an offence near of kin to the last, & is the agreeing with a party, to carry on a suit for him & the champertor is to share the profits. The buying up of notes of hand &c. is champerty if done for the purpose of gain, & for the sake of carrying on a law suit.

Of the Jurisdiction of the Jud.l Cts. in C. in criminal cases.—

In C. crimes are triable, according to their different degrees of aggravation or heinousness, by diff. Cts. viz: by Justices of the Peace, by the County Cts, & by the Superior Ct.—

Crimes punished with death, loss of limb, banishment, or imprisonment in Newgate, adultery, & questions of divorce under the Stat. are, except in two cases, triable by the Supr. Ct. only.— The two cases mentioned, are those of riots, & horse stealing.— In these two the Supr. & County Cts. have concurrent jurisdict.n A.B. Riots, are not punished in any of the methods mentioned above. (St. of C. 301.).—

Over offences punishable by Stat. & inferior to those above-mentioned, but beyond the jurisdiction of a Justice, the Cy. Cts. have exclusive jurisdiction.— Such are crimes punished with whipping, imprison.t or fine above 7 Dolls.—

Misdemesnors are offences ag.t morality, not punishable by any Stat.— Or, if a Stat. is made prohibiting certain acts, without affixing any penalty to their commission, these are misdemesnors & may be punished as such.— Over these, the Supr. & Cy. Cts. have in all cases concurrent jurisdiction. It is usual, however, for those of a higher nature, to be tried by the Supr. Ct. those of a lower by the Cy. Cts.—

+ Vid.

In cases of swearing, drunkenness, & sabbath breaking, the jurisdict.n of a Justice of the Peace is final; as it also is in cases of offences ag.t the law for restraining unlicensed houses (qu.) & selling &c. lottery tickets, contrary to the Stat.—

2. Sw. 389.
St. of C. 142. 284. 308. 407.—

In other cases, the Justice may try an offence for which the penalty does not exceed 7 dolls. but an appeal to the Cy. Ct. lies in most cases, except where it is expressly provided by Stat. that he shall have final jurisdiction. –

If the justice thinks the fine ought to be more than 7 dolls. or if he thinks it is an offence over which he has not jurisdict.n he may bind over the offender to the next Cy. Ct. for trial, that is, take bonds for his appearance at that Ct. or if he is not able to procure them, commit to Gaol to await his trial. –

St. of C. 142. Mr. Supposes, that a justice of Peace had not under our Stat. "concerning delinquents" (par. 3.) any power to enquire whether a person has been guilty of forgery, perjury &c. or any of the higher crimes & to bind over, or discharge at his discretion; for this would be to make him a trier of the offence. – (Mr's idea, I suppose, is, that if a person is complained of, by an informing officer, for such crimes as forgery &c. the justice has no right to discharge him; but must commit, or (if he can bail him) bind him over. – The most he can do, is to advise the informing officer to withdraw his inform.a). – But the justices, in C. do exercise this jurisdiction, tho' a discharge by the justice under such circumstances, does not operate as an acquittal, for the accused may, after such discharge, be indicted. – This practice of the justices in C. Mr. supposes arose by mistake, from the Stat. of C. ag.t breaches of the peace, concerning which the justices in C. have a right to exercise their judg.t in binding over, or discharging. –

St. of C. 330. Justices have cognizance of breaches of the peace by Stat. unless they are high-handed. But the Justices are to judge whether they are highhanded or not. Of riots, it has been determined that they have not cognizance, but they are to bind over the offenders. – The Stat. on this subject seems to contemplate only such breaches of the peace as arise from violence or injury offered to the person of an individual. –

Public Wrongs. Breaches of Peace &c.

In all cases of a trial before a justice, for a breach of the peace, the offender may appear. The practice of receiving a complaint from the offender himself, & inflicting a fine without enquiry, is illegal & improper. For, on such a complaint, the magistrate can never know the degree of aggravation which accompanied the offence.—

St. of C. 338. In cases of Private Assaults, which, by Stat. are made breaches of the peace, the party injured is allowed to testify, by the terms of the Stat. to the person of the assailant, & to all other facts which took place at the time of the assault; but not to facts prior or subseq.t.— If a third person be present, the assault is not secret. Yet, if the Pff. did not know of the presence of a third person, & has commenced his action under the Stat. he may proceed, tho' it be then discovered that another person was present. Qu.a in this action that the Pff. is a liar, is good on demurrer. — Pff. in this action, may use two persons instead of bringing one as a witness.—

Of Sureties to keep the Peace.

St. of C. 337. 4. Bl. C. 252. If any person has committed acts of violence & breaches of the peace; or if there is good reason to apprehend that he will break the peace he may be compelled to find Security that he will keep the peace. And on refusal to find such Surety, such person may be committed to prison by any justice or assistant, & must there remain till he yields compliance or is discharged by the Q. B. — Any person who is apprehensive that another will burn his house, restrain his liberty, or do him any corporal injury, may demand Sureties before a justice &c. of the person of whom he is thus afraid.

4. Bl. C. 253.

The person complaining to a justice &c. must swear to his fears, & must specify the grounds of such fears: And the justice may, on the oath of the party complaining, either with, or without further enquiry, compel the person agt. whom the compt. is made, to find sureties or be committed. – But, before the justice subjects him to the requisitions of the Stat. he ought to be satisfied that the fears of the complainant are well-grounded. – All persons are entitled to the benefit of this Stat. under the circumstances described.

4. Bl. C. 255. The bond given by the person complained of, under this Stat. is forfeited by his committing any act of violence agt. any person, if the bond be a general one. – The person bound is, in Eng. to appear before the next quarter-Sessions, & in C. before the next Cy. Ct. & the bond may then be continued or discharged at the discretion of the Ct.

The obligor in the bond is not liable to pay costs except on a petition to have the bond discharged, and if he will not make applicn. for this purpose, no costs can be recovered. Bonds have been discharged in such cases.

4. Bl. Com. 256. The power of binding to good behaviour, was incident to the Supr. Ct. of Westminster Hall, at com. law, upon the conviction of offenders who had been guilty of breaches of the peace &c. – The Stat. 34th Ed. 3d. gave this power to justices, & extended so far, that in the construction of the Stat. it has been holden, that all persons, guilty of any immoral act, punishable as an offence by the laws of society, are compellable to find sureties for their good behaviour. This is now the law upon this subject, and obtains in C.

Sureties of good behaviour are taken when no breach of peace has been committed, or is apprehended.

4. Bl. Com. 257 & are forfeited by any act, or misbehaviour which the recognizance was intended to prevent.

Public Wrongs.—

Of Indictments & Informations.—

4. Bl. Com. 302. 2. Hawk. 209. An Indictment is a written accusation of one or more persons, of a crime or misdemesnor, preferred to, & presented on oath by a Grand Jury.—Twelve grand jurors at least must agree to every indictment.— An indictm.t is proper, in all cases of offences ag.t com. law.

4. Bl. Com. 308.— An Information is a complaint in Ct. by the proper officer, of some offence.— It is concurrent w. an indictment in all cases of offences at com. law except those which are capital. In all capital prosecutions an indictment is the only proper accusation both in Eng. & C.—

If a Stat. points out any particular mode of proceeding (ex. gr. by information) that only can be pursued in a prosecution on the Stat. But if a Stat. prohibits a matter of public grievance & points out no particular mode of proceeding an indictment is always proper. Qu. Is not an inform.n also proper in this case, (it being a com. law proceeding) if the offence is not capital?—

If a Stat. respects concerns of a private nat. (ex. gr. a distress) an indictm.t is never the proper mod. of complaining under it.—

2. Hawk. 211. 1 Str. 673. If a Stat. inflicts a greater punishm.t than the com. law, & a prosecut.n commenced upon the Sta. cannot be supported, it may still be good at com. law.

Co. Lit. 126. 2. Rol. 398.— A bill or plaint is a kind of prosecution, brot in the Exchequer, by the Attn. Gen. for the recovery of a public penalty.— This is not known in practise in C. tho' it is mentioned in several Stat.s—

2. Rol. 398. Sal. 398. 380. 3. Mod. 132. 1 Wils. 340. 1. Burn. 91. Indictm.ts are necessary in Eng. only in cases of Treason & Felony.— They are good in cases of libels & batteries.— not good where individuals only are injured, & the peace is not endangered, as for a cheat; nor where the offence, tho' public, is punished by a penalty.—

Str. 829 1234. 1. Show. 399. Cro. Eliz. 583. 1. Show. 107. – If part of a penalty is given to the public, & part to an informer, inform.ⁿ or bill, is the proper warrant. – In all other criminal cases, (as well as in treason & felony) indictm.ᵗˢ are good. – For public offences under felony, inform.ⁿˢ are good. –

2. Sw. 374. &c. – In C. information is good for any offence not capital. –

Of matters & persons capable of being joined in an Indictment. –

2. Hawk. 240. –

3. Durnf. 99. – 1. If an offender has been guilty of several offences of a like nature, as burglary & larceny, they may be joined in an indictm.ᵗ ag.ᵗ him. If the offences are of a different nature he must be indicted for each offence seperately. –

3. Durnf. 99. – 2. If several offenders have been guilty of the same offence together, they must be joined in an indictm.ᵗ if the offence can be joint. Otherwise, if the offence of one cannot be the offence of all. Ex.gr. If several persons join in committing an assault, a burglary, or a forgery, they may be joined in an indictm.ᵗ for the offence; because these are offences which may, in their nature, be joint. – But, if several perjure themselves at the same time, in the same case, they cannot be joined in one indictm.ᵗ; for, the offence cannot be joint, so that the offence of one, cannot be the offence of all.

2. Hawk. 240. Str. 870. 2 Bur. 986. – Str. 921.

Public Wrongs. — Indictments. —

General requisites of an Indictmt. &c. —

2. Hawk. 220. — 3. Burns. 132. — 300. 1. H. 571. — Cro. 7. 2. H. 241. 280.

As every offence must be tried in the county where it was committed, it is necessary that the county should be laid in the indictmt. — But where the crime is such as may be continued or renewed, in contemplation of law, in every stage of the offender's progress from one place to another (as, in larceny) if the offence is committed in one county, & is continued into another, the indictmt. may lay it in either. — At com. law, if a man was mortally wounded in one county, & died in another, the offender could not be indicted for murder in either. — This rule of com. law was altered by a Stat. of Edw. 6th. — Is this binding in C.?

Every indictmt. must state that it has been found by a grand-jury under oath. — The day of the commission of the crime must also be stated: but proof of the act charged, tho' committed on another day will maintain the indictment. — Where the offence is an omission, the day need not be stated. —

2. Hawk 230.

Figures vitiate an indictment, tho' they do not hurt a declar.n in a civil case. — A trifling clerical mistake is not fatal to an indictmt. —

4. Burns. 166.

In criminal prosecutns the charges must be positive; not disjunctive, as, "that he did, or caused to be done" &c. — They must be particular, not general, except in the case of common barators, common scolds, rape. —

2. Hawk. 226–8. — Sal. 371. —

As to the use of technical words, which are, in many cases indispensable, in indictmts. &c. See authts.

Cro. Eliz. 483. 137. — 5. Mod. 96. 129.

At Com. law, the words "vi et armis" were necessary in all indictmts. — they were dispensed with, by Stat. of Hen. 8th. — Hawkins asserts that at com. law these words are not necessary, in cases where they would be absurd; but he is not supported by authority. —

2. Hawk. 244. — Cro. Jac. 473.

Public Wrongs — Indictments.

1. Vent. 108. 111. The words "agt. the peace," are necessary at com. law, in charging all offences, except those of omission.

2 Hawk. 243-4. In charging crimes lower than felony, the word "unlawfully," is not necessary, unless the act is made unlawful by Stat.

The words "contra dignitatem" &c. are not necessary in charging any offence. In charging felonies, the word "feloniously" is always used.

In Eng. the finding of a petit jury, may, in some cases, be equivalent to a finding by the grand jury — as, if deft. in action of slander, having called the plf. a thief, proves the truth of the words, & the jury find the issue in favor of his plea of justifica. Here, the Plf. may, on the finding, be put to plead immediately. No such practice in C.

A grand jury cannot find bills vera as to part only of the indictmt.; but a new bill may be framed.

Hardw. 113. Stra. 1015 &c. On an indictment for a high crime, the person indicted may be found guilty of a lower offence of the same species. Eg. gr. On an indictmt. for murder, the jury may find manslaughter. But on an indictmt. for robbery, the accused cannot be found guilty of larceny; for the offences are different in their nature. In C. the above rule does not always obtain; for in some cases, the offence of a lower degree is triable in the Cy. Ct. only, while the higher offence is within the jurisdictn. of the Sup. Ct. only.

If the Ct. discover that the accused has been guilty of a crime of which he cannot be convicted on the original indictmt. they will keep him in custody to be charged with another process.

Public Wrongs. — Indictments &c. —

2. Hawk. 204. &c.

Of Qui tam prosecutions &c.

2. Sw. 181. con. 184. 37.

When an individual is injured by a public offence, he may bring a qui tam ag.t the offender, whether it be so provided by the Stat. or not. (qu.) — (This is probably true only where a Sum is by the Stat. given to the party injured, & a fine to the State, or when a penalty is inflicted & divided by the Stat. between the State & the party. — Has it not been decided, that an individual cannot prosecute in this case, unless empowered by the Stat.?

2. Hawk. 210. Kel. 220. Cro. Car. 531. 558. 1. Bur. 545. —

On an indictment or other process at the suit of the public, the party prosecuting or injured is a good witness: But in this case, the party injured cannot recover damages on the indictm.t &c. but must resort to an action on the Stat. — And whenever a Stat. gives damages to a party injured by a public offence, they cannot be recovered on the indictm.t &c. for the public injury, unless the Stat. so expressly provides. —

An indictm.t or inform.n is a bar to a qui tam prosecut.n for the same offence, & vice versa. —

When a Stat. gives a penalty to an informer the public may prosecute on the Stat. But the fine inflicted on this public prosecut.n cannot exceed the penalty. —

2. Hawk. 210.

If a Stat. contains no words of prohibition but merely enacts "that persons committing a certain act, shall pay a certain Sum to an informer" there can be no indictm.t by the public on the Stat. Otherwise, if there is a prohibitory clause. —

Prosecutions qui tam, may be bro't in the county in which the complainant lives, tho' the offence was committed in another county. (Qu. unless the complainant be the party injured? vid 2. Sw. 180. tit. 401.) Eng. Law is otherwise 2 Burn. 241. —

2. Burn. 241. —

2. Sw. 183. —

Qui tam act.ns lie for forgery, perjury, & theft. —

Public Wrongs – Qui Tam Pros.ns &c.

+Ord. 4. 212. – It has been decided by the Sup.r Ct. in C. that if, on a qui tam action, brot under the Stat. of C. ag.t disorders &c. in the night-season, the deft. appears & negates the charges, the Pf. may resort to com. law evidence, & if, by this evid.ce he can prove the deft. guilty, he may recover on the same complaint, as at com. law, damages for the injury sustained. The Ct. considering the complaint, under these circumstances, as amounting to a declar.n in trespass vi et armis at com. law. But, in such a case, the fine is not inflicted. – Qu. Why may not com. law evidence support the complaint, as a complaint on the Stat.?

4. Bl. Com. 308-9. In Eng. it is not uncommon for private persons in their private capacity to prosecute for public offences, which are punished by a fine or penalty, even tho' no part of the penalty belongs to the prosecutor, as it does in actions qui tam. – This mode of prosecuting has been rejected by the Cts. of C. – All prosecutions of this kind, must be brot forward, here, by a public officer.

2. Durn. & E. 190. 198-9. 205. These individuals, in Eng. undertake such prosecutions merely for the sake of the costs, which are generally large enough to afford them a very liberal compens.n for their trouble. The right of prosecuting in this manner, is not confined, to such persons as have suffered from the offence; but, is open it seems to all persons. – Individuals become, in this way, prosecutors, even on indictments tho' not in cases of very heinous offences. – They prosecute 2. Durn. & E. 205. – thus, for offences incurring corporal punish.t – The individual, in all these cases, prosecutes for the king only, & not, as in qui tam actions, for the king, & himself –

It was formerly the practice, in C. on qui tam, pros.ns to require of the informer a bond to secure the State's part, before granting the ex.n. It is now customary to divide the penalty, & grant two ex.ns one for the prosecutor, & the other for the State. – Is this practice warrantable?)

The prosecutor, in a qui tam action must enter into a recognizance to respond damages to the adverse party. –

Public Wrongs. —

If an offender ag.t a criminal Stat. which is afterwards repealed be not prosecuted to judgm.t before the repeal, he cannot be punished under the Stat. at all. This rule has been acted upon by our Sup.r Ct. on a prosecut.n for violating the provisions of a repealed Stat. ag.t inoculating for the small-pox. If, therefore, a prosecut.n ag.t such an offender is not commenced till after the repeal of the law, which he has violated; or, if, having been commenced during the existence of the law, it has not been pursued to judg.t before the repeal, the offender cannot be punished by virtue of the Stat. — But, if the offence be a crime at com. law, the offender may still be punished, either on a prosecut.n commenced after the repeal, or on one pending under the Stat. at the time of the repeal: In both of these cases he is convicted & punished as at com. law. — But, if the offence be created by a positive Stat. no prosecut.n of any kind can be either commenced or continued after the Stat. is repealed; unless the act expressly provides that the repeal shall not affect antecedent offences. —

Ibid. 4.

In criminal actions, judg.t in chief never goes ag.t the accused except upon the plea of "not guilty". If therefore, he should plead a demurrer to the indictm.t or a plea in bar, which should be found ag.t him, the judg.t is not ag.t him in chief but "respondeat ouster". — In case of indictm.ts for treason or felony, no justific.n can be plead specially, but it must be given in evidence under the gen.l issue. —

4 Bl. Com. 338.

Ibid. —

In Eng. new-trials are never granted in criminal cases. — In U. S. they are sometimes obtained in favor of the accused, but never for the public. —

Ibid. 233.
1 Wils. 103.

3. Bur. 1696. 1901. No representation made by jurors after verdict will be received to contradict their finding. - Nor can a motion in arrest be rec.d after sentence is pronounced.

After verdict ag.t a delinquent for an offence punishable by fine, evidence is heard to mitigate or enhance the fine. - But a distinct offence cannot be proved for this purpose. -

Stra. 139.

Of Bail in criminal cases. -

2. Sw. 389. 390-1. A justice may take bail when an accused person is brot before him, if the offence charged is a bailable one. As the Stat. of C. has not defined bailable offences, recourse must be had to com. law to determine what offences are or are not bailable. - Yet the com. law on this subject is not adopted in all cases in C. -

4. Bl. Com. 297-8. At com. law, even treason, & all offences other than homicide were bailable; but the lowest degree of homicide was not so - qu. w.s not justifiable homicide bailable?! -

But the Stat. of Westm.r (3. Edw. 1.) takes away bail from treason, arson, breaking of a public gaol & all felonies of which the accused is "notoriously guilty". Other felonies, therefore, than those mentioned, are bailable, unless the accused is notoriously guilty, i.e. unless he is taken in the act of committing the crime, or with the mainour, or has confessed. - But this rule of law, that certain offences are not bailable, applies only to subordinate officers (as Sheriffs & justices in Eng. & justices & assistants in C.) & not to the Ct. of B.R. in Eng. nor to the Supr. Ct. in C. - These Cts. may grant bail in any case whatever. For manslaughter charged they always bail. And tho' the charge

1. Sw. 180.

4. Bl. Com. 299.

be of murder, if on enquiry they think the offence only manslaughter, they will sometimes bail. In one instance they have done it. (Who? - R. R. or Supt. Ct.?).

1. Sw. 180. It has been a prevailing opinion that one charged with murder or any capital offence is not bailable. But, Supt. Cts. may bail in such cases. —

When a participes criminis becomes a witness, agt. his fellow-offenders, he may be committed to secure his testimony for the trial. It has also been supposed that a justice &c. may not only require sureties of any other witness, but on failure or inability to procure surety for his appearance, may commit him also. - Mr R. supposes, that no magistrate or Ct. has any such right. They may require such witness to give surety for his appearance in a criminal case; but, if he cannot procure it, they have no authority to commit him. - If, indeed, the witness is a man of property his own bond is suff.t &, as, in this case, he can do what is required, he may perhaps be committed if he will not. — But, the bond of a poor witness is not suff.t; and, if he cannot procure other surety, there seems to be great injustice in committing him: indeed, such a thing has never been done. - The Stat. indeed, provides that if a witness refuses to appear and testify, the justice &c. holding the trial, may apprehend & commit him. —

Stat. of C. 142.

2. Sw. 391. — Recognizance of bail, may be chancered. —

Of Cost in criminal cases.

St. of C. 143-4. By the Stat. of C. on this subject, a person accused of a crime & acquitted, is not subjected to the costs of prosecution, unless, (tho' not guilty of the crime charged) he was the culpable cause of the prosecut.n — If he was guilty, neither of the crime charged, nor of any unlawful or blameable act, which led to the prosecut.n the State or town, as the case may be, must bear the cost. — If the offence is tried by the Supr. or County Ct. the State pays the Cost; if by a justice the town pays it: the cost in these cases, being paid out of that fund which would receive the fine, had one been inflicted by the Ct. before whom the trial was had. —

St. of C. 144.

If the accused is found guilty, in a criminal prosecution, of the offence charged, or of any misconduct as aforesd. he must pay the cost. And, if he has not property suff.t he may be bound to service. But, if from the nature of the case, he cannot be bound to service, either by reason of the heinousness of the offence (as murder or any other capital offence), or by reason of inability to labour, & has not property, the costs must be paid out of the State or town treasuries, as aforesaid —

Of Bail. —

Bail, when given by the deft. upon being arrested, is for the purpose of restoring him to his liberty, without injuring the Plf. — This is called bail to the officer, or in C. common bail. — And, in civil cases, the officer holding a deft. in custody, is always obliged to accept sufficient bail, when offered; & if he refuses, is liable to an action. —

4. Bl. Com. 297.
3. Ib. 290. —

The terms of the bail-bond are, that the deft. shall appear at Ct. at the time of trial. But, if he does not, the bond is not, of course, forfeited. — For, if the deft. is surrendered into custody, any time within the life of the exn which issued upon the suit for which he was arrested, the bond is saved, the ref. being by this act, put in as good a situation as he would have been, if the deft. had been the whole time in custody. — But if he is not thus surrendered, the surety is liable in debt, or on a sci. fa. for debt & costs. — In Eng. the surety is not liable if the debtor is surrendered at any time previous to judgt. on the sci. fa. But he is also liable for the cost incurred on the sci. fa. —

2. Sw. 174-5.

When exn has issued agt. the principal, (he not being surrendered into custody) the officer may return non est inventus in less than 30 days, & then the bail becomes liable, that return of the officer being conclusive,* if made fairly; but if the officer colludes with the plf. in making this return hastily & unnecessarily, no advantage can be taken of it agt. the bail. — It has not been settled whether, if the officer without colluding with the plf. makes this return unfairly, the ref. can avail himself of it. — 2u. When the officer is secured by a bail bond, can he take the principal without a surrender. —

*2u. whether the return of the officer is conclusive? 2. Dunf. 757-8.

In Eng. a prisoner in custody at the suit of the king, cannot be charged with civil process, without leave of the Ct. or some of the judges. — 2u. in C.? —

4. Dunf. 317.

Bail.—

The bail may at any time, on suspicion of the principal's intending to escape, take the latter wherever he can find him, & surrender him into custody of the officer. He is, for this purpose, in Eng. furnished with a bail-piece which is a certificate of his being bail, & entitles him to take the principal at any time. We have no bail-piece in C. but the bail is entitled to a certificate from the Clerk, which answers the same purpose.

Salk. 626. 5. Durn. 25. The bail may take their principal on Sunday, & surrender him afterwards.

The bail-bond taken by the Sheriff is negotiable & if it is sufficient, i.e. if the bondsman is capable of paying it the plf. is bound to accept it from the Shff. in case of forfeiture. It is commonly sued in C. in the officer's name, but being negotiable it may be sued in the name of the plf. to whom it is assigned.— If the plf. refuses to accept the bail-bond from the officer, & sues him, the sufficiency of the bond is tried. If it is found insuff.t the plf. will recover ag.t the officer, & the latter is left to his remedy ag.t the bail. If it be found suff.t the plf. fails in his action, & must accept the bond ag.t the bail.—

Barn. & Ad. 80. cm. It has been settled that if at the time of taking the bail-bond the bail appeared to be suff.t the officer shall not be subjected in the event of its insufficiency. For, he is obliged to accept suff.t bonds; and as he must exercise his judg.t as to their sufficiency, he shall not be made liable if he has conducted himself prudently.—

4. Durn. 121. 2. Ib. 360. Insanity does not exempt from an arrest, & the deft. altho' insane must procure bail, or it must be procured for him

Bail.—

When the deft. is arrested, & brot into Ct. by the officer, or having been liberated upon bail for his appearance, is surrendered by the surety, he must be committed to Gaol, unless he procures special bail (in Eng. called bail above or bail to the action) which is taken in Ct. by consent of the plf. or a decision of the Ct. By this bail the surety is bound for the deft's appearance to respond judg.t — The rules respecting a forfeiture of this bond, & the consequences of such forfeiture are the same, as in case of the bail-bond before mentioned.

When a deft. is brot into Ct. upon an arrest, or is surrendered by his bail, he must plead with these words "In* custody of the Ct." & if the plf. accepts a plea not containing these words, the deft's body is of course discharged. (Is the action also discharged?) And if the bail has not surrendered him to the Ct. but the plf. accepts a plea without the words "in custody &c" the bail is discharged.

*Are these words necess.y if the deft. has put in special bail or bail above? —

On the appearance of the deft. to answer to the action, the bail may discharge himself by surrendering* him to the Ct, that is by moving the Ct. to take him into custody. And if the deft. has not been liberated upon bail, on his appearance to answer to the action, the plf. must move the Ct. that the Shff. take him into custody: otherwise he (the plf.) runs the risque of the deft's escaping. — The record of the Ct. is the only evid.ce of the bail's surrendering the debtor into custody of the Ct. —

*Vid. 391. b.

Kirb. 18.

The bail may sue his principal for mere liability, without having sustained actual damages at com. law: & by the Stat. of C. in case of recovery of judg.t ag.t him (the bail) by the plf. he may sue his principal, without having satisfied the judg.t —

*Vid. 172.

Bail.

Of Bonds given by the Plf.

St. of C. 24. By Stat. in C. Plf. living in another State, on bringing an action agt. this State, must always procure bonds for prosecution: For, if he should fail in his suit exn. cannot go agt. him (i.e. out of the State) for the cost. The design of this bond therefore, is merely to secure the paymt. of the cost; And if judgt. in this case, goes agt. the Plf. nothing but actual paymt. of the cost discharges the bondsman. — The deft. must, however, take out exn. agt. the principal, & have a non est invent. returned before he can proceed agt. the bondsman: But this return need be only as to property; for, if he finds the principal in the State he is not bound to take his body. Or, if he does take his body & commit him to prison, & he (the deft. in exn.) swears out, the bondsman is liable. — Qu. What if he breaks gaol?

St. of C. 24. 29. If a person unable to pay cost, brings a suit, he must on motion to the Ct. by the adverse party, procure bonds before he can proceed. This practice is not usual at com. law & in C. bonds in this case are given only in suits before com. law Cts. & not in Eqty. cases. — These bonds are given to the adverse party. — In this case, also, nothing except actual paymt. of cost discharges the bondsman. —

St. of C. 28.

St. of C. 24. Every Plf. in an attachment must give bonds to prosecute. — The practice is to take the Plfs own bond, if he is a man of property. This practice seems to be founded on the notion, that the bond in this case is a security for the costs. In this point of view the practice is absurd & the bond useless. But, if the object of the bond is (as Mr. R. supposes) a security for the property attached, the practice of taking the Plfs own bond evidently frustrates the scope of the law. —

Of Bonds on an Appeal.

Whenever a party appeals to a higher Ct. he must give a bond with surety, to prosecute his appeal to effect. By this is not meant, that unless the appellant gains his cause, the bond is forfeited; but he is merely bound to go forward with his appeal & if he does not the bond is forfeited. — For, as the appeal destroys the judg.t below, if the appellant does not prosecute his appeal to judg.t in the Ct. above, the adverse party who recovered below, would be deprived of all the advantages of his judg.t — An appeal may be taken at any time during the session of the Ct. but, if the pty. does not move for an appeal immediately after verdict or judg.t as the case may be, ex.n may possibly issue before he takes his appeal, & the appeal will be no supersedeas to the ex.n — After an appeal is entered or moved for, ex.n cannot issue — If the appellant does go forward & prosecutes his appeal, but judg.t is again rendered ag.t him, the bondsman is liable for cost only: but he is liable for all the cost, viz. that incurred both before & after the appeal. (What if after the appeal appellant becomes a bankrupt, & unable to satisfy the judg.t is not his bondsman liable for the debt in that case?)

But, the bondsman is not liable even for cost if it can be obtained from the appellant. It is, therefore, necessary for the adverse party, to take out ex.n ag.t the appellant, & to have a non est returned; i.e. is a non est as to property. — A non est ag.t the principal, in all the preceding cases, lays a foundation for a fi. fa. ag.t the surety. —

If there is special bail as well as a bond on the appeal, & non est is returned as to the estate (qu. whether it must not also be of the body, to subject the special bail) of the appellant, the special bail is liable for the debt & both he & the surety in the appeal are liable for costs. —

Bail.—

Hid. 390.a.

When special bail has been given for the deft. & judg.t in his favor in the Ct. below which upon writ of error is reversed it is a question upon which the authorities are contradictory whether the special bail is discharged by the judg.t in the first Ct. or whether they are bound to answer final judg.t—

Cro. Jac. 95. 303
Moor 850.
830.

Cro. Jac. 532.
H. 320. contra

If the plf. sues out ex.n ag.t the bail & obtains no satisfaction, he may still resort to the principal.

1. Sid. 107

But if he has once taken the principal the bail is discharged.

1. Leo. 220
Cro. Jac. 320.

Bail is in its nature joint & several & where there are more than one surety, either one or more may be sued at the option of the plf.—